WHAT IS CHRISTIAN MARRIAGE?

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An Examination of the present teaching and practice of the Church of England, in relation to the teaching of the Universal Church; with suggestions for the revision of her law by the Church of England

BY

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TO MY WIFE

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INTRODUCTION

I HAVE, in this book, endeavoured to give a comprehensive, though fairly short survey of the Church's teaching on the subject of marriage, as well as an account of the present position, in relation to marriage, of the Church of England. The problem before the Church of England in view of the present increase in divorce is part only, I believe, of the larger problem of the relation between Christian marriage and marriage as understood by the secular law; and it is from this point of view that I have ventured to put forward the suggestions for the revision of her law by the Church of England which appear in Chapter IX.

This book is intended for the ordinary clergy and educated laity rather than for the expert canonist, and I have tried to avoid the use of technical terms, or, where I have used them, to explain their meaning. If it serves to call the attention of these readers to the nature of the problem before the Church of England, it will have achieved its purpose. I am conscious of its many imperfections, but it is an honest attempt to examine the problem in the light of the historical teaching of the universal Church; and I would crave the same indulgence as is, I believe, extended by the House of Commons to the maiden speeches of its members.

I would like to take the opportunity of thanking those friends who have encouraged me in this undertaking: Sir Harry Vaisey and Mr. Geoffrey Bles for the loan of books; the Rev. C. E. Douglas for some helpful criticism of Chapters IV to VII; Prebendary Eley for many helpful criticisms and suggestions, and especially for his great kindness in reading the proofs; and last, but by no means least, my sister-in-law, Mrs. Daniel Macmillan, for the loan of her

typewriter, without which this book might never have been written.

A. T. M.

January 1944

P.S.—Since the MS. was set up in type, the Joint Committees of the two Convocations—see pp. 66, 119 and 136—have reported. They recommend a New Table of Prohibited Degrees, in place of Archbishop Parker's Table, which will bring the Church's law on this matter into line with the law of the land.

July 1944

Part One

BEFORE CHRISTIANITY

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CHAPTER I

MARRIAGE AMONG PRIMITIVE RACES

THE study of the earliest forms of marriage, together with the beliefs, customs and rules relating thereto, has in the last century been very widely undertaken, and the results of the researches of anthropologists and ethnologists have been given to the world in very many learned works. As is natural, there is, among the experts, a certain divergence of views on both major and minor points, for the study of this vast subject means not only careful investigation of the marriage customs, now and in the past prevailing among the lower races, questions of fact often difficult accurately to ascertain, but also the explanation of those facts, which include the religious beliefs and superstitions, and the economic conditions which resulted in particular customs. This latter investigation involves the drawing of correct inferences from established facts, and it is not, therefore, surprising to find differences of opinion among the experts.

Certain broad conclusions are, however, obtainable, and as the purpose of this book is to consider the doctrine of marriage as developed in the Christian Church and now held in the Church of England, and also to put forward certain suggestions thereon, the consideration of the marriage customs of the primitive races is useful only as those customs show the first beginning of that development of man's ideas and conceptions of marriage, from his earliest known days, through the civilizing influences of his moral and intellectual development, and finally culminating in the Christian doctrine of holy matrimony.

In the world as it is today marriages of so many different kinds exist, some monogamous, others polygynous, some dissoluble, others indissoluble, that it might be questioned whether there is in truth any single idea which the word marriage can be regarded as importing. This, however, is a superficial view, and it will be found that throughout the history of mankind there are certain fundamental requisites to marriage, the absence of which prevents there being any marriage. To quote Dr. Westermarck:

> Marriage is generally used as a term for a social institution. As such it may be defined as a relation of one or more men to one or more women which is recognized by custom or law and involves certain rights and duties both in the case of the parties entering the union and in the case of the children born of it. . . . Marriage always implies the right of sexual intercourse: society holds such intercourse allowable in the case of husband and wife, and, generally speaking, even regards it as their duty to gratify in some measure the other partner's desire. . . . At the same time, marriage is something more than a regulated sexual relation. It is an economic institution, which may in various ways affect the proprietary rights of the parties. It is the husband's duty, so far as is possible and necessary, to support his wife and children, but it may also be their duty to work for him. As a general rule he has some power over them, although his power over his children is generally of limited duration. . . . It is, finally, necessary that the union, to be recognized as a marriage, should be concluded in accordance with the rules laid down by custom or law, whatever these rules may be. . . . And no man and woman are regarded as husband and wife unless the conditions stipulated by custom or law are complied with.[1]

Marriage, in the above sense, appears to date from the very earliest times of human history: Dr. Westermarck thinks it probable that it developed out of a primeval habit.[2] Also it is worth noticing that the supposition that primitive man originally lived a sexually promiscuous life, and that marriage evolved as a regulation of promiscuity, is regarded by many eminent authorities as being not only

[1] Westermarck, *History of Human Marriage*, 1921, i, 26-7.
[2] Westermarck, *op. cit.* i, 27.

unsupported by any evidence, but definitely in conflict with the evidence.[3]

Marriage by Capture, Consent or Purchase

Roughly speaking, the methods of contracting marriage found among early man can be divided into three; marriage by capture, marriage by consent, and marriage by purchase. The first method is that of taking a woman by force without the consent either of herself or of her family or kindred. This method has existed in various parts of the world; indeed in some parts, *e.g.* High Albania and among Caucasian mountain tribes, it existed in quite modern times. But among no people has it been found as being the usual or normal method of procuring a wife, and it was usually either an incident of war[4] or a method employed where it was difficult to obtain a wife by peaceable methods. Though marriage by capture has undoubtedly existed, it has been neither prevalent nor the normal method of contracting marriage.

The second method of marriage, marriage by consent, covers cases both of consent of the parties themselves and where the consent of some other person or persons was necessary. In the latter case the consent of the parties to the marriage was sometimes essential, sometimes non-essential. Marriage by consent of the parties needs no special consideration: it is the normal method, and the one to which modern man has become so accustomed as to think that it must be and always have been universal. This, however, would be a mistaken idea. Although it frequently happens that marriages are contracted by the free choice of the parties, with little or no interference by others, there have been and are races in which marriages are arranged between the parents of the parties, and sometimes even between other relatives, without reference to the

[3] Westermarck, *op. cit.* chs. iii and ix. Crawley, *The Mystic Rose*, edited by T. Besterman, 1927, i, 205; ii, 259.

[4] See Deut. xxi, 10.

wishes of the parties to the marriage. This, of course, is most prevalent where the custom of infant or child betrothal prevails. Often the betrothal is not binding on either party, or is binding on the female only, but probably as a rule the marriage is consummated. Among some savage tribes marriage contracts are concluded by the parents of the parties even when these are grown up. Although a young man is in some cases dependent on someone else's will in the choice of a wife, it is much more frequently found that it is the girl who is thus dependent in the choice of a husband. As is natural, even when the consent of the parties is essential to a valid marriage, it is common to find the wishes of parents or relatives in the form of advice exercising almost coercive influence: in this respect mankind seems to have changed but little since primitive days.

The third method, marriage by purchase, strictly means that the bride is given by her father in consideration of money, or more often goods, paid or transferred to him by or on behalf of the husband. As is to be expected, it is nearly always found where the consent of the wife is not necessary to the marriage.

This form of marriage is not nearly so common among primitive peoples as is sometimes imagined. The custom of bride gifts — a custom surviving in present times in mutual wedding presents between the groom and his family and the bride and her family — has sometimes been explained as indicating marriage by purchase.

This is probably a mistaken explanation. In primitive races gifts have a far greater significance than among civilized peoples. To a primitive man a gift is part of himself, a pledge given to another and received by him.[5] Where, as is common, it is paid to her father, it may be that it is a pledge of a man's ability to keep his wife, and of his future proper treatment of her.

Among the Xosa Kaffirs the bride price makes the father take an interest in the behaviour of his daughter because, if she is divorced by her husband for a good reason, the bride price has

[5] Crawley, *The Mystic Rose*, ii, 136 and 138.

to be returned; whereas if the marriage is dissolved owing to ill-treatment of the wife, the husband may lose what he paid for her.[6]

Although mercenary motives may often influence fathers in giving their daughters in marriage in primitive as in civilized races, it seems that the custom of "bride price" is no more, properly speaking, marriage by purchase than in modern times would be regarded a father insisting on a prospective son-in-law making a settlement on his daughter.

Persons between whom Marriage allowed

The next matter for consideration are the rules regulating the class from which a wife or husband may and may not be chosen. These rules fall into two main divisions, not mutually exclusive but often occurring side by side. They are known as endogamy and exogamy. Endogamous rules are those which forbid a member of a particular group to marry anyone who is not a member of the group; exogamous rules are those which forbid a member of the group to marry anyone who is a member of the group.

It seems to have been widely felt, among primitive races, that it was disgraceful to marry into a different race, especially into one regarded as inferior. This aversion is seen mostly to occur between those races which greatly differ from each other in ideas, habits and civilization generally, and of course, possibly strongest of all, in physical appearance: also probably the aversion is particularly common among women. These aversions are common to man throughout his history; the Old Testament shows the feelings of the ancient Semites,[7] and endogamous rules based on differences of religion both have been and are still prevalent. In modern times not only does the feeling against intermarriage between different races remain strong, but to it have been added customary prohibitions between different classes of the same race.

In addition to these general rules, there are certain par-

[6] Westermarck, *History of Human Marriage*, ii, 394.

[7] See *e.g.* Gen. xxiv, 3, 37; xxvi, 34; xxviii, 1. Judges xiv, 3.

ticular ones which are found among a number of primitive peoples. One is that cousins should marry: this nearly always meant, not cousins indiscriminately, but certain cousins only, usually children of a brother and sister, not children of two brothers or of two sisters. In some cases also the marriage of uncle and niece was prescribed by custom. In a few cases marriage between brother and sister has been allowed, though this is not at all common. There is, however, evidence that in Egypt the later Pharaohs married their sisters or half-sisters, a practice in which they were followed by the Ptolemies.[8]

Two practices should, perhaps, be shortly noticed here; they are known as the levirate and the sororate. The former was the right, even sometimes the duty, of a man to marry his deceased brother's wife.[9] The latter was the practice of marrying sisters, either consecutively or concurrently.

The exogamous rules governing marriage have been numerous, varied and often complex. They have been the subject of a great deal of research and of many learned works, and the explanation of them in terms of primitive psychology and religious beliefs is still a matter of controversy among experts. It is neither our purpose nor within our ability to examine them critically. It can, however, be said that the most universally observed exogamous rule is that which forbids marriage between any near relatives, *i.e.* father and daughter, son and mother, and brother and sister. The practice of brother and sister marriage in ancient Egypt — and possibly in a few other cases — mentioned above, seems a very slight exception to the general rule. Both the feeling and the law against incest are deeply rooted, and it is just as wrong to think that incest was once prevalent as to think that sexual promiscuity was once prevalent. Mr. Crawley writes, "All the facts are directly opposed to any probability that incest or promiscuity were ever really practised at all."[10]

[8] Westermarck, *History of Human Marriage*, ii, 91.

[9] Deut. xxv, 5 is an instance, though this was restricted to where the deceased had died childless.

[10] Crawley, *The Mystic Rose*, ii, 205.

Marriage Age

As a general rule the age of marriage is puberty. Among primitive peoples men and women grow to puberty sooner than in the more civilized, and among the more northerly races development is still later. The age of puberty was therefore regarded as being much earlier than would seem natural to us. It is to be remembered that in Roman law a man was *pubes* (or marriageable) at fourteen, a girl at twelve, ages adopted by the Church's law, and that by English law until only a very few years ago a boy and girl could lawfully marry at those ages.[11]

The practice of child marriage is very prevalent in many parts of the world, *e.g.* among the Hindus of India. Usually, though not always, this form of marriage is not immediately consummated; this takes place at the age of puberty only.

Number of Husbands and Wives

The vast majority of peoples, both primitive and civilized, practise either monogamy or polygyny. The two systems are found, in different proportions, in all parts of the globe. The extent of the practice of polygyny is difficult accurately to determine, partly because those tribes which allow it must be reckoned polygynous though it may be very little practised in fact. In many tribes also it is the king or chief alone who is allowed more than one wife; in many polygynous tribes he may have more than his subjects are allowed. Among the tribes of South America Dr. Westermarck thinks that the number in which polygyny is common does not amount to a third of the number in which it is practised either occasionally or not at all.[12] In the wild tribes of the Malay Peninsula polygyny is said to be unknown. It is in Africa that polygyny is found at its height, both in point of

[11] The present ages are sixteen for both parties. The Act substituting that age for those of fourteen and twelve was passed in 1929; and see Chapter VIII, *infra*.

[12] Westermarck, *History of Human Marriage*, iii, 3.

frequency and the number of wives.[13]

The causes favouring the adoption of both monogamy and polygyny are various; they may perhaps be tabulated thus:

> Favouring polygyny: The preponderance of women over men. The long periods of continence enjoined on husbands: these occurred at menstruation, during most of pregnancy, child-birth and lactation. This last period was much longer than in civilized peoples. The practice in certain tribes of men first marrying women much older than themselves. The rapid ageing of women among savages. The male taste for variety: the desire for children and for many children. The custom, mentioned above, of the levirate. Last but not least among many tribes, a number of wives not only increased a man's material comfort but stamped him as a man of wealth and social importance. It was like having two motor cars or a house in both town and country.
>
> Conversely the causes favouring monogamy were: More equal distribution of the sexes. The absence of disparity in wealth or rank in a tribe. The expense of more than one wife. Domestic trouble likely to arise from jealousy between the wives. This last circumstance led, it is thought, in some cases to the custom of marrying several sisters, called the sororate, or even other relatives such as mother and daughter, or aunt and niece.[14]

As a whole it seems that monogamy was very largely practised among savage people, and that, although of course many savage tribes were polygynous, progress of civilization up to a point has proved favourable to polygyny.

Polyandry, the custom of one woman having several husbands, is a much rarer form of marriage than either monogamy or polygyny. It usually occurs where there are few women, and poverty and pastoral habits seem much associated with it. Polyandry is frequently, if not usually,

[13] The greatest number of wives known to have been allowed to any one man is in Uganda, where King Mtessa, and in Loango, where the king is said to have had 7000 wives. Westermarck, *op. cit.* iii, 21.

[14] See Westermarck, *op. cit.* iii, 97, and authorities there quoted.

fraternal, *i.e.* the woman's husbands are brothers. The object seems to be to keep the property in the family, and as in the tribes in which it is practised the men are away for many months at a time, that there shall always be one husband at home to protect the wife and homestead. In Tibet polyandry has existed from time immemorial, and is still common, the husbands being, as a rule, brothers.

Duration of Marriage

The laws and customs relating to the duration of marriage and to divorce, as they developed and existed among those peoples which, though ancient, are usually reckoned civilized, will be particularly considered later, so far as they influenced western civilization. Here all that need be said is that, among savage races, the general rule was that marriage was for an indefinite length of time or for life; though it could in the latter case frequently be dissolved during the lifetime of the parties. In a few instances, but not in many, marriage is contracted for a definite fixed period, varying from a week to a number of years. As regards those marriages which are for life, the laws, as might be expected, differ. In some few uncivilized peoples marriage is indissoluble and divorce unknown: in others divorce, though possible, is rare, the marriages usually lasting for life: in others again it is very frequent, the men and women having many different wives and husbands in the course of life. In some tribes a marriage, previously capable of being ended, becomes permanent and indissoluble after a child has been born, sometimes even when pregnancy is established. It may be more accurate to describe such a marriage as incomplete until it results in offspring.

Marriage Rites

Marriage rites among primitive peoples is a subject to which much research and learning have been devoted. The tracing of the various rites to their origins in the various beliefs underlying them means practically trying to discover

the psychological reaction of primitive man to his surroundings, animate and inanimate. All that is necessary to the present purpose is to try to state, in a brief and general way, and, it is hoped, correctly, the nature of those rites, their purposes, and the beliefs that gave rise to them.

The first matter to notice about marriage rites is their universality: it is doubtful whether investigation has really discovered any tribe in which no rites exist. Mr. Crawley, in his work already quoted, writes:

> Few people, if any, of those known to us, are without some marriage ceremony. As to those who are said to possess none, it will generally be found that there is some act performed which is too slight or too practical to be marked by an observer as a ceremony, but which when analysed turns out to be a real marriage rite.[15]

Dr. Westermarck also agrees with this view.[16] It is obvious that in any form of social life it is of first importance that it should be generally known what men and women are married, hence it is not surprising that the most general social object of marriage rites is to give publicity to the union. As in modern civilized countries, so in very many primitive peoples, in order to be recognized as valid, the union had to be sanctioned by an official. The publicity is achieved in various ways; the extremely frequent custom of a marriage feast is one of them, the guests being regarded as witnesses. Many of the rites symbolize the union between the man and the woman; indeed Mr. Crawley regards it as the essence of a marriage ceremony,[17] and quotes as an instance the case of the Orang Benuas, where an elder speaks these words: "Listen, all ye that are present; those that were distant are now brought together; those that were separated are now united." This was followed by the couple approaching and joining hands, which concluded the ceremony. The variety of rites symbolizing union is very great indeed; a common one is for the bride and bridegroom to eat or drink together, sometimes both. Marriage rites are closely inter-

[15] Crawley, *op. cit.* ii, 29. [16] Westermarck, *op. cit.* ii, 594-5.
[17] Crawley, *op. cit.* ii, 30.

woven in a complicated series of practices and taboos, and are regarded as having magical efficacy, the objects often being to help consummation of the union and promote fertility. In addition to rites designed to secure positive blessings — a long and happy union, children, etc. — there are others designed to protect the couple from evil influences or to rid them of such influences. Among primitive races there is a very general feeling that the bride and bridegroom are at this time particularly exposed to evil influences against which they need protection. The origin and explanation of this belief is a vast subject, on which much has been written.

Early man regarded himself as prone to danger or attack from many outside influences, which he attributed to contact with, or even proximity to, many different objects, animate and inanimate. Anything new or unusual was also a source of danger. From this there was worked out an intricate system of taboos, *i.e.* those people and objects with whom it was dangerous for him to associate; either at all or at particular times or seasons. These ideas produced sexual taboos, which probably originated from sexual differentiation, difference of occupation, and a resulting solidarity in each sex. Very often boys and girls of the family were separated at an early age and brought up apart from each other. This resulted in a feeling that all intimacy between the sexes, and especially intercourse, even between husband and wife, was dangerous; a feeling which later developed into it being thought sinful. Many of the marriage rites found in primitive races are designed, by breaking or removing the taboo, to neutralize this danger.

CHAPTER II

MARRIAGE AMONG THE ANCIENT JEWS

THE importance of ancient Jewish teaching regarding marriage is obvious. The purpose of this book being to trace the course of the teaching of the Church, it is clearly vital to consider not only the law of marriage as formulated in the Old Testament, but also the manner in which it was understood by the Jewish theologians and teachers in the time of Our Lord. The Christian law of marriage neither is nor can be regarded as a wholly new code, independent of the Old Testament law: the two are intimately connected, for, as is stated in the Seventh of the Articles of the Church of England,

> The Old Testament is not contrary to the New: for both in the Old and New Testament everlasting life is offered to Mankind by Christ, who is the only Mediator between God and Man, being both God and Man. Wherefore they are not to be heard, which feign that the old Fathers did look only for transitory promises. Although the Law given from God by Moses, as touching Ceremonies and Rites, do not bind Christian men, nor the Civil precepts thereof ought of necessity to be received in any commonwealth; yet notwithstanding, no Christian man whatsoever is free from the obedience of the Commandments which are called Moral.

Not only did Our Lord repudiate any intention of destroying the Law and the Prophets, and say that He came "not to destroy but to fulfil," [1] but as regards the marriage law He explicitly affirmed the original law contained in the first chapters of Genesis, abrogating only those concessions to human "hardness of heart" which Moses had made. As Father Hebert writes,

> The matter may be thus summarized in general terms: that in all these questions (*sic* the Sabbath, Ritual Uncleanness, Marriage

[1] Matt. v, 17.

and Divorce, Justification by performance of the Law, Sacrifice) the Old Testament actually reaches the conception which the New Testament will later express, not merely foreshadowing it or dimly hinting at it, but clearly grasping it and expressing it in words; so that Our Lord and the apostolic writers after Him are found appealing to the authority of the Old Testament for the meanings which they give.

In what follows we have had inevitably to attempt to treat a large subject in a very condensed way, but we hope that it contains a fair and accurate summary of this important subject.

The earliest teaching regarding marriage to be found in the Bible occurs in the books of the Pentateuch. These were compiled from different sources, some of which date from the eighth and ninth centuries B.C. The historical and legendary events they record took place many centuries before this. The story in Genesis of the creation of man is the story of his creation as God intended him to be before sin corrupted his nature; and the authors clearly teach that marriage is a divinely appointed ordinance. This is, of course, the belief of the Church, being so explicitly stated in the Preface to the Marriage Service in the Church of England Prayer Book: "Holy Matrimony; which is an honourable estate, instituted in the time of man's innocency". Such texts as Gen. ii, 18, "And the Lord God said, It is not good that the man should be alone; I will make him an help meet for him"; Gen. ii, 24, "Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh"; and Gen. i, 28, "And God blessed them: and God said unto them, Be fruitful, and multiply, and replenish the earth", contain lessons which are as important today as ever they were, and which have been too often forgotten. They place woman in her true relationship to man;[3] they show the married state and the sexual functions in their true aspect as part of God's creation to be used by man and woman, and they are really

[2] A. G. Hebert, *The Throne of David*, 1941, pp. 97-8.

[3] Gen. iii, 16 suggests that the inferiority of woman is due to the fall; and see Hebert, *op. cit.* 104.

incompatible with either polygyny or the dissolubility of marriage during the lives of the partners. Nowhere in the Old Testament, though it is full of condemnation and prohibition of fornication, adultery and unnatural sexual practices, is any trace to be found of that taboo or fear of the sexual functions as such which, as we have already seen,[4] is common among primitive peoples. Nor do we find in the Old Testament any indication that celibacy was regarded or recommended as superior to matrimony; in the Rabbinical teaching the contrary is definitely taught.

The above passages set forth an ideal of marriage, but an ideal which was never attained by the people of Israel, either in fact or in its legislative code.

Monogamy and Polygyny

The Old Testament relates, without expressing any sort of disapproval, how polygyny was practised by the Patriarchs down to and including Solomon. It is clearly recognized in the Law, which to some extent regulated it (see *e.g.* Deut. xxi, 15 *et seq.*); and marriage to a wife's sister during the lifetime of the wife was forbidden by Lev. xviii, 18 (see also Exod. xxi, 9, 10). Also the High Priest had to be monogamous (Lev. xxi, 13). After Solomon there are practically no recorded instances of polygyny being practised; the case of Joash in 2 Chron. xxiv, 2 and 3, is possibly the only instance. Although polygyny was lawful, and remained so until the eleventh century A.D.,[5] it was felt to be incompatible with the ideal of marriage set forth both in the passages from Genesis [6] already quoted and also in the Wisdom literature (see *e.g.* Prov. xxxi, 10-31). Also the Mosaic Law, by insisting on equal treatment of a man's several wives,[7] and by forbidding a man to prefer, in the matter of inheritance,

[4] *Supra*, p. 11.

[5] M. Mielziner, *Jewish Law of Marriage and Divorce in Ancient and Modern Times*, 2nd ed., 1901, p. 30.

[6] In the story of the flood, also, the monogamous principle seems to be assumed.

[7] Exod. xxi, 10.

the child of a second and favourite wife,[8] must have acted as a powerful deterrent to polygyny to any but the very wealthy. It is probable that polygyny ceased to be at all largely practised after the return from the Babylonian Exile. Where it was practised it was probably confined to cases where the first marriage was childless,[9] or where a man had, in accordance with Deut. xxv, 5, taken to wife a childless brother's widow.[10]

Prohibited Marriages

These fell under different categories, according to the reason for their prohibition.

1. Prohibitions based on consanguinity and affinity.

These prohibitions, which form the basis of the Christian law, are contained in Lev. xviii. A man may not marry,

On grounds of consanguinity—
- Mother: verse 7.
- Sister, of whole or half blood: verses 9 and 11.
- Granddaughter: verse 10.
- Aunt, either father's or mother's sister: verses 12 and 13.

On grounds of affinity—
- Father's wife, *i.e.* stepmother: verse 8.
- Father's brother's wife: verse 14.
- Son's wife: verse 15.
- Brother's wife (except in cases stated in Deut. xxv, 5): verse 16.
- Wife's daughter: verse 17.
- Wife's granddaughter: verse 17.
- Wife's sister during life of wife: verse 18.

The sanction for these laws, as well as for those prohibiting unnatural sexual offences, was death (see Lev. xx, 11 *et seq.*).

It is to be observed that daughter is not expressly forbidden, though it might reasonably be held to be implied in the prohibition of granddaughter, and the law was so

[8] Deut. xxi, 15.

[9] According to Rabbinic teaching this was a ground of divorce; see *infra*, p. 21.

[10] Mielziner, *op. cit.* p. 29.

interpreted. The Rabbinical law extended to a certain extent the above list, *e.g.* it forbade marriage to a mother's brother's wife. It will be noticed that the marriage of uncle and niece is not forbidden, and in fact it was quite common and indeed recommended among the Jews.[11]

It is clear that the Mosaic Law, in its later form, in many respects restricted the existing practices. We have already seen how excessive polygyny was restricted, and the prohibited degrees forbade certain marriages which are related as having taken place in early times: Abraham married Sarah who was his half-sister (Gen. xx, 12), and Jacob's wives Leah and Rachel were sisters (Gen. xxix). Possibly the story of this unhappy marriage prompted the reason, given in Lev. xviii, 18, for forbidding concurrent marriages to two sisters. The continued existence of the legal right of a man to marry more than one wife resulted in the legal rule that a husband was guilty of adultery only if he had intercourse with a married woman: intercourse between a married man and an unmarried woman was not adultery; it might be legally construed into a marriage.[12]

2. Prohibitions based on religious or tribal reasons.

The consciousness which Israel always had of her divine vocation led to a rigid exclusiveness lest her religion become paganized, and this exclusiveness showed itself, among other things, in strict rules prohibiting inter-marriages between her sons and daughters and the women and men of the surrounding pagan nations. In Gen. xxiv we read how Abraham, when he had grown old, sent his servant to find a wife for his son Isaac, but made the servant swear not to get for Isaac a daughter of the Canaanites, among whom Abraham was then living.

The Deuteronomic law (Deut. vii, 1-4) prohibits intermarriage with members of seven named Canaanitish nations, including the Canaanites, the reason being stated, "For they will turn away thy son from following me, that they serve

[11] Mielziner, *op. cit.* p. 39.

[12] I. Abrahams, *Studies in Pharisaism and the Gospels*, First Series, 1917, p. 73.

other gods". Later Ezra and Nehemiah extended this prohibition to include all pagan nations of the country, and compelled those who had entered into such marriages to put away their heathen wives.[13] Later religious authorities, in the time of the Maccabeans and in the time of the wars against the Romans, prohibited all marriages between Israelites and Gentiles, and this became the established law of the Talmud and Rabbinical Code. After having embraced the Jewish religion, a Gentile was free to intermarry with an Israelite.[14]

There were, in addition, certain prohibitions personal to particular individuals. Thus a high priest might not marry a widow or a divorced woman, but must marry a *virgo intacta*.[15] An ordinary priest might not marry a divorced woman, and no priest might take a "wife that is a whore or profane".[16] Rabbinical interpretation of this passage extended, in the case of a common priest, this prohibition to a sterile woman unless he already had a wife or children.[17]

3. Prohibitions from considerations of chastity.

There were certain prohibitions based on feelings of chastity or decency. Thus a man could not re-marry a wife whom he had divorced and whose second husband had either divorced her or died.[18] Marriage between an Israelite, either man or woman, and a bastard was also forbidden.[19] A wife who had been divorced for adultery, actual or suspected, could not marry her paramour: this was a Rabbinical prohibition.[20]

The Levirate

As we have already seen, the custom of a man marrying his deceased brother's wife exists in many primitive races. From Gen. xxxviii, 8, where Onan is called upon to marry

[13] See Ezra ix and x: Neh. x, 30 and xiii, 23 *et seq.*
[14] Mielziner, *op. cit.* pp. 45-6.
[15] Lev. xxi, 13 and 14.
[16] Lev. xxi, 7.
[17] Mishnah; Yebamoth 6, 5.
[18] Deut. xxiv, 3 and 4.
[19] Deut. xxiii, 2.
[20] Mishnah; Sotah 5, 1. This is still the law of Scotland under an Act of 1600, c. 20. See *Ency. of Laws of Scotland*, vol. 6, p. 25, *sub nom.* Divorce. In practice it is evaded by omitting the name of the paramour from the decree as the man with whom the wife has committed adultery. See also *infra*, p. 62.

the widow of his brother Er, it is evident that already in the patriarchal period it was an established custom that in the case of a man having died without children, his surviving brother was in duty bound to marry the widow. This custom was retained in the Mosaic Code, and a marriage with a brother's wife, generally prohibited, as we have seen, in Lev. xviii, 16, was not only allowed but enjoined where the brother had died childless.[21] The purpose of this custom was to preserve the family name and property of the dead brother, and it is provided (Deut. xxv, 6) that the first child of the marriage shall succeed in the name of the dead brother "that his name be not put out in Israel". This duty of marrying a dead childless brother's wife could be escaped, and if the surviving brother refused to marry the widow, which he was entitled to do, he had to submit to a curious and somewhat humiliating ceremony, fully described in Deut. xxv, 7-9, which was called *chalitza*. The widow was not free to marry another man until this ceremony had been performed. The law as to levirate marriage and the ceremony of *chalitza* is minutely elaborated in the Mishnah and Talmud, but these do not concern us. This custom, which was in full force in the time of Our Lord and for a long time afterwards, was of course the basis of the question about the resurrection put to Him by the Sadducees, and which is recorded by all the synoptists.[22]

Methods of Contracting Marriage : Age

In the Mosaic Law no fixed forms of celebrating marriage are mentioned, though the occasional references made to betrothed women show that there were probably formalities both for betrothal and marriage.[23] These passages show also that after betrothal the woman was to a large extent tied to her betrothed, and that intercourse between her and another man was regarded and punished as adultery. These passages, together with that in Matt. i, 18-25, also show that a betrothal

[21] Deut. xxv, 5-10.
[22] Matt. xxii, 23 : Mark xii, 18 : Luke xx, 27.
[23] Deut. xx, 7 and xxii, 23 *et seq.*

could be ended only by death or divorce.[24] In later Rabbinical law certain formalities were prescribed for betrothment (*Kiddushin*) and nuptials (*Chuppa*), and the Mishna[25] is full of precise legislation regulating them.

There is no express regulation in the Old Testament as to the age at which marriage could be contracted. The Rabbinical legislation fixed it at puberty, *i.e.* for males the completion of the fourteenth year, for females the completion of the twelfth year. A father, or if he were dead a mother or brother, could, however, in early times give a minor girl in marriage, but it was voidable at her option on attaining the age of puberty.[26] Marriage required the consents of the parties.

Divorce

The principal passage on divorce in the Mosaic Law is the well-known one in Deut. xxiv, 1 and 2:

> When a man taketh a wife, and marrieth her, then it shall be, if she find no favour in his eyes, because he hath found some unseemly thing in her, that he shall write her a bill of divorcement, and give it in her hand, and send her out of his house. And when she is departed out of his house, she may go and be another man's wife.

This rule as to the necessity of a formal bill of divorce was a restriction on the earlier right or power of a husband to discard his wife at will and with scant ceremony;[27] also the minute and numerous regulations of the Rabbinical law relating to the formalities of writing and delivering the bill of divorce usually necessitated the aid of an expert rabbi and acted as a brake on hasty divorces.

The proper interpretation of the above passage from Deuteronomy was a matter of dispute between the schools of Shammai and Hillel, and it was in regard to this that

[24] That after betrothal a man and woman were considered as virtually man and wife — probably for all purposes short of cohabitation — appears from Mary being twice called Joseph's "wife" (verses 20 and 24), and Joseph is once called Mary's "husband" (verse 19).

[25] The Mishnah was compiled at the end of the second century A.D.

[26] Mielziner, *op. cit.* pp. 71, 72.

[27] Abrahams, *op. cit.* p. 67.

the Pharisees questioned Our Lord (see Matt. xix, 3). The former school construed it as restricting the right to divorce to where the wife had been unchaste, the latter as giving the husband the right to divorce his wife for any cause. The difference between the teaching of the two schools is also referred to in the Mishnah:[28] as a matter of law the opinion of the school of Hillel prevailed. According to Jewish law, divorce was always the act of the husband; the consent of the wife was not necessary, and she could not herself be the divorcing party: also, strictly speaking, the husband need not have any particular ground for divorcing his wife. The wife's position was, however, protected in Rabbinical legislation in two ways, in addition to the restraining influence, already mentioned, of the necessity of having a bill of divorce carefully drafted by an expert rabbi. On marriage the husband was made to execute a mortgage of all his property, real and personal, charging it with the payment of a certain sum to his wife in the case of his death or of her divorcement. The wife could, where the divorce was due to her misconduct, be condemned to forfeit this provision. Also in proper cases, where the husband was in fault, he was practically compelled to divorce his wife.[29]

There were two specific cases in which the Mosaic Law deprived the husband of all right to divorce his wife. If he brought an unsuccessful virginity suit against her, he could never divorce her: and where a man seduced a virgin he had to marry her and could never divorce her.[30]

By the strict Mosaic Law the punishment for adultery by a wife was death, and her paramour was similarly liable.[31] The law required the culprits to be caught in the act; it can never have been frequently enforced,[32] and was most probably obsolete long before the time of Our Lord. If a husband suspected his wife of adultery he could accuse her to the priest, and she would be made, unless she confessed, to undergo the trial by bitter waters. This is described in the

[28] Gittin 9, 10.

[29] Abrahams, *op. cit.* p. 75. Mielziner, *op. cit.* pp. 118, 123. Mishnah; Ketuboth 7, 9: Gittin 9, 8.

[30] Deut. xxii, 13-19, 28 and 29.

[31] Lev. xx, 10: Deut. xxii, 22.

[32] Abrahams, *op. cit.* p. 73.

fifth chapter of Numbers. This ordeal was, apparently, still used in the time of Our Lord, but seems to have been abolished not long after. In the Mishnah it is stated that it was abolished by Rabbi Johanan ben Zakkai, "when adulterers became many".[33] In the above two cases, of a wife either taken in the act or convicted of adultery by trial by bitter waters, the husband had no option but to divorce his wife; the Jewish law regarding the offence as one which the husband could not condone or forgive, and the wife forfeited the provision of the marriage settlement. Also, as already mentioned, the divorced wife and her lover could not intermarry. The husband could, however, if he wished, divorce her without any public trial, in which case she was entitled to her settlement; and, presumably, in such a case she would be free to marry whom she wished, as there would not be any conviction against her and any man.

According to the teaching of the Mishnah, the barrenness of the wife, after ten years of marriage, was a ground of divorce;[34] the commandment in Gen. i, 28, "Be fruitful, and multiply", being regarded as necessitating this provision. In such a case the wife might, apparently, lose her marriage settlement.[35] Later it was disputed whether in such a case the husband should be compelled to divorce his wife, or alternatively to marry another wife.[36] Divorce by mutual consent was always allowed, the theory being that the consent of the parties was just as essential to the continuance of the marriage as to its creation.[37]

The above is an attempt to give, in very brief outline, an account of marriage as it existed in Israel round about the time of Our Lord, though it necessarily goes in certain respects slightly beyond that time. We have tried, as far as we can, to state accurately the relevant law of marriage, and of necessity the law of divorce has figured largely. It might be doing an injustice to the Jewish race and to its

[33] Sotah 9, 9.
[34] Yebamoth 6, 6 : Gittin 4, 8.
[35] Ketuboth 11, 6.
[36] Abrahams, *op. cit.* p. 77. Mielziner, *op. cit.* pp. 29, 125. See *supra*, p. 15.
[37] Abrahams, *op. cit.* p. 69.

religious teachers if we did not make it clear that it does not follow that because the law allowed divorce as freely as it did, divorce was therefore very frequent or looked upon favourably by the religious authorities. From such researches as we have been able to make — including many more authorities than are referred to in the footnotes — it seems that the opposite was the case. Apart from the passages already referred to, the Old Testament contains numerous others emphasizing the sacredness of the conjugal union;[38] see for instance Mal. ii, 15-16:

Therefore take heed to your spirit, and let none deal treacherously against the wife of his youth. For I hate putting away, saith the Lord, the God of Israel.

Divorce was, as Our Lord said, given to men "because of the hardness of your hearts", and was regarded by the Jewish teachers as a lesser evil than marriage marred by conjugal infidelity or mutual aversion, but was still seen as an evil and to be discouraged.

[38] Many such passages, as well as others to the same effect from the Rabbinical writings, are collected in Mielziner, *op. cit.* pp. 15-19.

CHAPTER III

MARRIAGE IN ANCIENT ROME

AMONG the contributions of ancient Rome to the world which have been the most valuable and have lasted longest must be reckoned her law. The Roman mind was eminently practical and systematic, and Roman law developed gradually and scientifically, culminating in the Corpus Juris Civilis, compiled in the reign of Justinian, A.D. 527–65. As is well known, Roman law is the basis of the legal systems of many countries, and even in this country, whose common law is not based on Roman, the student first begins by studying that law. The Roman law, as it affected marriage, is therefore of cardinal importance in tracing the development of the law of marriage into Christian times and through the Christian Church. Knowledge of the law of marriage of any country will not, however, of itself, or necessarily, give an accurate picture of the people's beliefs or views about marriage. To take an example, it would not be accurate to judge that in those countries where marriage before a civilian official was, by the law, obligatory and the religious ceremony optional and void of legal result, religious ceremonies of marriage were less numerous than in countries such as England, where a religious ceremony is, legally, efficacious. Any attempt to discover the general attitude of a people towards marriage necessitates the examination of matters other than merely the law relating thereto.

Marriage, the centre of all family life, is bound up with the social habits and customs of a people, and of course largely also with their religion. It will be best, therefore, before describing the history and development of the marriage law of Rome, to try, quite shortly, to get a picture of the social and religious background against which that law developed.

The religion of the early Roman was not anthropo-

morphic ; that only came in, so far as it ever did, from outside influences, and chiefly with the influence of Greek thought, about the last century B.C. The names they gave to their gods were adjectival, not proper names, clearly expressing some character or function exercised by the powers to whom they were given. The very word *numen* suggests that the Roman divine being was a functional spirit with will power, his function being indicated by his adjectival name. Religion in Rome quickly became both State-controlled and State-managed ; the propitiation of the gods of the State became a matter for State priests, and also became systematized into a complex *jus divinum* (ecclesiastical law), in which the only contribution of the ordinary citizen was to abstain from business on certain appointed days. Existing earlier than the development of the State religion, and continuing alongside it, was the religion of the family. As this changed much less than did the State religion,[1] and because it is, after all, the religion in the family that most determines a people's religious views, we will try to state shortly what was, among the early Romans, the family organization and religion.

The earliest Romans were divided into clans,[2] *gentes*, all the members of which bore the same name and were supposed to be descended from a common ancestor. As a result of settling down in the land these clans had, inevitably, subdivided into smaller units, and this unit, known as the family, or *familia*, comprised the living descendants of a living ancestor, and was thought of as including not only the human beings, but also the house, cattle, sheep, lands and slaves.[3] The family was an economic unit, developed out of the clan which was solely a unit of kin. The earliest Romans were an agricultural, not an urban people, and being, as before stated, an essentially practical people, the religion of the family developed in reference to its practical and daily

[1] Warde Fowler, *The Religious Experience of the Roman People*, p. 69 : " It may be said without going beyond the truth that the religion of the family remained the same in all essentials throughout Roman history, and the great priesthoods of the State never interfered with it in any such degree as to affect its vitality ".

[2] The traditional number was ten.

[3] Warde Fowler, *op. cit.* p. 86, n. 9.

needs. In the house itself *Vesta*, the spirit of the fire, the *di penates*, the spirits who guarded the *penus* or store cupboard of the household, and the *lares*, or household gods associated with the hearth, were the important household gods, representing the material wealth, in the house, of the family. *Vesta* was seemingly not only the spirit of the fire but the fire itself — to the practical non-speculative mind of the early Roman the two were indistinguishable, just as the *di penates* were spirits indistinguishable from the substances comprising the store; the frequently changing character of which is probably the reason why they were always conceived and expressed in the plural. There were other spirits or deities connected with the entrance to the house, the land and its various activities, and the boundaries of the land (*Terminus*); also a spirit known as *Genius*, of whose exact nature there is considerable doubt: this was probably the soul of a man which enables him to fulfil his work in continuing the life of the *gens*. As the ancient Romans believed that the happiness of the dead in another world depended on their proper burial, and on the renewal by their descendants of prayers, feasts and offerings for the repose of their souls, it was clearly important for the ancient Roman to perpetuate his race, that the family cult might be kept alive. Marriage was, therefore, a religious duty. It must be borne in mind that the above spirits, or gods, were regarded as localized where were the physical objects from which they were often only vaguely distinguished, and also were restricted, so to speak, to their own particular family. The *Vesta*, *lares* and *di penates* of family A were not those of family B. They were household gods, and the religious ceremonies and sacrifices addressed to them were conducted by the head of the family, the *paterfamilias*, on their behalf, just as the city's gods were the gods of Rome, not of other cities, and their worship conducted by the State priests. It followed, therefore, that on marriage a Roman girl not only left one human family and became incorporated into another, but also left one divine family for another, and marriage was an initiation into the cult and mysteries of her new family. As Mr.

Warde Fowler writes: "We may even go so far as to say that the new *materfamilias* was in some sort a priestess of the household, and that she must undergo a solemn initiation before assuming that position".[4]

Bearing in mind this religious background, we can next consider the Roman law of marriage, but before doing so it will be well to state, quite shortly, another matter of Roman law relating to the family, namely that known as *patria potestas* and *manus*.

In the Roman family the authority of its head endured throughout his life. A *paterfamilias*, or head of the household, exercised absolute power over his wife, his children, daughters-in-law and all descendants related through males. When his daughter married she passed out of his power into that of her husband, or, if her husband were himself subject to power, into that power. The power of a *paterfamilias* over his wife, though practically identical in content with that over his children and remoter issue through males, was called *manus*; his power over his children was called *patria potestas*. *Manus*, which in time came to mean chiefly the power of a husband over his wife, was originally the generic term for all the rights, not only over the things belonging to him, but also over the persons subjected to him. As we shall see, the subjection of a wife arose only where the marriage had been celebrated in a particular manner, or rather, in one of three ways, which were originally the only methods of contracting a legal marriage. We shall also see that, largely for reasons connected with property, *manus* as a legal consequence of marriage gradually became obsolete, and the methods of contracting marriage which resulted in *manus* were given up, but it is almost certain that this resulted only in a marriage losing a part of its legal character while retaining its essential religious features.[5]

[4] Warde Fowler, *Social Life at Rome*, p. 137. See also Muirhead, *Roman Law*, 2nd ed. p. 31.

[5] Warde Fowler, *Social Life at Rome*, p. 140. Chapter V of this book contains a description of a Roman marriage, as the author thinks it was celebrated in the time of Cicero.

Forms of Marriage

Probably the oldest form of marriage was that known as *confarreatio* (a solemn offering of bread): [6] this was a religious ceremony, conducted by the high priests of the State — the *pontifex maximus* and the *flamen Dialis* — in the presence of ten witnesses: we do not know what were the exact words — *certa et sollemnia verba* — used in the ceremony.[7] This form of marriage was restricted to the patricians, who were the members of the clans, *gentes*, already mentioned, and who in the earliest days alone were citizens and enjoyed the *connubium*, or right to contract lawful marriage, *justae nuptiae*. The reforms brought about by Servius Tullius, 578–535 B.C., admitted the plebeians to citizenship, thus giving them the *connubium*, and the *Lex Canuleia* (445 B.C.) rendered lawful marriage between patricians and plebeians. *Confarreatio* remained, however, restricted to patricians, and it is probable that until after the last-mentioned law no patrician married in any other way. Probably about the time that plebeians became full citizens, the form of marriage known as *coemptio* (mutual mock sale) was introduced. This was an adaptation of the form of conveyance of property, well known in Roman law, called *mancipatio*, and Gaius describes

[6] This is not accepted by all the authorities, some of whom regard *coemptio* as a survival of a primitive marriage by real sale. The view stated in the text is widely held; its absolute correctness or otherwise is not important to the present purpose.

[7] Gaius, *Inst.* I, 112, thus describes the ceremony: "Farreo in manum conveniunt per quoddam genus sacrificii, quod Jovi Farreo fit; in quo farreus panis adhibetur, unde etiam confarreatio dicitur; conplura praeterea hujus juris ordinandi gratia cum certis et sollemnibus verbis, praesentibus decem testibus, aguntur et fiunt, quod jus etiam nostris temporibus in usu est; nam flamines majores, id est Diales Martiales Quirinales, item reges sacrorum, nisi ex farreatis nati non leguntur; ac ne ipsi quidem sine confarreatione sacerdotium habere possunt" (Confarreation, another mode in which subjection to hand originates, is a sacrifice offered to Jupiter Farreus, in which they use a cake of spelt, whence the ceremony derives its name, and various other acts and things are done and made in the solemnization of this disposition with a traditional form of words, in the presence of ten witnesses: and this law is still in use, for the functions of the greater flamens, that is, the flamens of Jove, of Mars, of Quirinus, and the duties of the ritual king, can only be performed by persons born in marriage solemnized by confarreation. Nor can such persons themselves hold a priestly office if they are not married by confarreation). Gaius wrote about the middle of the second century A.D. See also P. E. Corbett, *The Roman Law of Marriage*, p. 71.

it as an imaginary sale and purchase *per aes et libram* (for money), in the presence of a *libripens* (one who holds the scales) and five citizen witnesses.[8]

Besides the above two forms of contracting marriage, there had grown up and become customary law a more informal mode of marriage known as *usus*. It had become accepted as part of the customary law by the time that the Law of the Twelve Tables, the earliest written compilation of the law, was drawn up, *i.e.* 451–448 B.C. A practice seems to have grown up among some of the plebeians to tie the marriage bond rather loosely in the first instance. This was due, probably, to two causes: first, that before they obtained *connubium* they had formed a habit of taking a *de facto* wife to become the mother of their children (*matrimonium*), and therefore had become accustomed to a relationship short of a strictly legal marriage; second, that possibly women objected to renouncing their independence and right to retain their own property and earnings. To this irregular marriage seems to have been applied, after plebeians obtained *connubium*, the principle, well known in most systems of law, that long possession to something to which the original title was defective perfects the title, and that a man might therefore acquire all the rights flowing from a legal marriage (*justae nuptiae*) by prolonged cohabitation with a woman as his wife. The period required was one whole year of unbroken cohabitation, and the Law of the Twelve Tables recognized this, providing that if she wished to avoid subjection to her husband (*manus*), a woman who absented herself annually from his roof for three nights thus barred the application of the doctrine and remained free from *manus*.[9]

In early days the only unions recognized as full legal marriages (*justae nuptiae*) were those which resulted in *manus*, viz. *confarreatio*, *coemptio* and *usus*: the informal marriage by *usus* accompanied by the *trinoctii absentia*

[8] *Inst.* I, 113. Owing to the faulty state of the manuscript, the exact legal nature of *coemptio* cannot be known. The difficulties and speculations to which this has given rise do not, however, concern us.

[9] See Gaius, *Inst.* I, 111. Gaius here mentions that this law has now been abolished, partly by statute and partly by mere disuse.

(absence for three nights) came to be known as *matrimonium jure gentium*,[10] and was possible even for aliens. *Manus* became gradually obsolete, largely probably because thereby women lost the rights of succession to their own family, whereas in marriages without *manus* wives remained in law members of their own families. This took place gradually, and the details of the development are obscure, though it was probably complete about the time of Cicero. Gaius tells us that the law regarding *usus* and *trinoctii absentia* was entirely obsolete in his time, and though he speaks of *coemptio* in the present tense it is probable that it existed in theory only. *Confarreatio* survived for one purpose only, to qualify a person to be a *rex sacrorum* or one of the greater *flamines* (priests), offices to which only persons born of parents who had been thus married were eligible, and they themselves had to be married in this way.[11] A senatus-consult (decree) of Tiberius, A.D. 23, limited the effect of *confarreatio* to giving the wife her husband's *sacra* (private religious rites) only; it ceased to deprive her of her own family for secular purposes. The result was that the old informal marriage without *manus*, originally merely *matrimonium jure gentium*, came to be recognized as *justum matrimonium*, the children and remoter issue coming under the power (*patria potestas*) of the husband. Provided the parties were legally capable of intermarriage and intended immediately beginning cohabitation, any declaration of consent, in whatever form given, sufficed for a legal marriage. It is a question which has given rise to controversy to what extent, if at all, what was known as *deductio uxoris in domum mariti* (bringing of the bride to the husband's home) was essential to the complete validity of the marriage. Some writers maintain that the status of man and wife dated only

[10] The *jus gentium*, though spoken of by Gaius and Justinian as " the common law of mankind " and " the law in use among all nations ", may more accurately be described as that later branch of Roman law which, originally developed to regulate transactions between citizens and non-citizens belonging to States having no commercial rights secured by treaties, was eventually accepted in the dealings between citizens, and so became part and parcel of the Roman law. See further Muirhead, *op. cit.* p. 225 *et seq.*

[11] Gaius, *Inst.* I, 112.

from such *deductio*, others that it was not essential to marriage, and that it was only important as evidence of the marriage should the question become one for judicial enquiry.[12]

Marriage by *usus*, above described, as well as the development of Roman law which virtually abolished all formalities as legal requisites, survived into Christian times and, as we shall see later, was developed into the law of the Church. The law of Scotland, which recognized any declaration of intention followed by cohabitation as a regular marriage as well as the irregular marriage by cohabitation with habit and repute, was taken practically directly from the Roman law.[13]

Persons between whom Marriage allowed

As appears above, the right to contract a marriage fully legal (*justae nuptiae*) was known as *connubium*, and was at first restricted to patricians who alone were citizens. In the sixth century B.C. plebeians were granted citizenship, which gave them the *connubium*, but as we have also seen, it was not until the passing of the *Lex Canuleia* about a century later that intermarriage between patricians and plebeians became lawful. Later it became the practice to grant *connubium* to certain Latin cities or colonies, in which case intermarriage between a citizen and such a colonist became possible. *Connubium* was also sometimes bestowed individually on veterans in return for good military service. Also before the *Lex Julia et Papia Poppaea* was passed in A.D. 9 a freeborn citizen (*ingenuus*) had no *connubium* with a freedman (*libertinus*), *i.e.* one who had been freed from slavery by his master. The large influx of foreigners into Rome consequent on her rise in political importance naturally led to quite a common practice of marriage in fact between Roman citizens and foreigners. These could not be, and were not ignored, but were regarded as *matrimonium jure gentium*, with certain important legal results, such as giving the parties rights in

[12] See *e.g.* Muirhead, *op. cit.* p. 323, n. 1. Corbett, *The Roman Law of Marriage*, p. 90 *et seq.* Leage, *Roman Private Law*, p. 90.

[13] Unlike English law, Scottish law is based on Roman law. Irregular marriage is now abolished in Scottish law, since Jan. 1, 1940: Marriage (Scotland) Act, 1939. See *infra*, p. 78.

regard to property, the wife to her dower when the union was dissolved, and the husband an action, *accusatio adulterii*, if his wife proved unfaithful. The children, although held to be foreigners like their mother, and not in their father's *potestas*, were in a true sense his lawful children whom he was bound to support. After the Emperor Caracalla (A.D. 211–17) had extended citizenship to all free subjects of the Empire the distinction ceased to be of importance.

In addition to marriage there was a form of inferior union which was more or less recognized, known as concubinage. This was a more or less permanent union between a free man and a free woman formed without the intention of constituting marriage, *affectus maritalis*. It was more or less recognized in that a man could have only one concubine at a time and could not have a wife at the same time as a concubine. Concubinage received partial sanction in the *Lex Julia et Papia Poppaea* (A.D. 9), a law designed to prevent misalliances and to force men and women of a certain age to marry and have children by imposing penalties — by way of incapacity to take under a will — on unmarried and childless persons. By the Christian Emperors many of the provisions of this law were repealed, and hardly a trace of its distinctive features remained in the time of Justinian. The practice of concubinage was discouraged by these Emperors, but was not altogether forbidden until the time of Leo Philosophus in the ninth century.

Slaves, being in the eye of the law chattels and not persons, were incapable of marriage of any kind, but a permanent connexion between two slaves or between a slave and a free woman was called *contubernium*. Here the natural relationship of father and child was to some extent recognized.[14] Accordingly, when slaves had become free, and thus capable of intermarriage, they were held to be within the rules as to prohibited degrees.

The prohibited degrees within which marriage was forbidden seem to have been wider in the earliest days than they

[14] *E.g.* as a *justa causa manumissionis* (adequate motive of manumission) under the *Lex Aelia Sentia*; see Gaius, *Inst.* I, 18 and 19.

subsequently became. All ascendants were at all times prohibited from intermarriage, and in the early law marriage was forbidden between collaterals up to the sixth degree inclusive. The method of computing degrees was to count up to the common ancestor and down again to the collateral, *i.e.* brother and sister are related in the second degree, first cousins in the fourth, uncle and niece in the third, and so forth. The early law thus forbade the marriage of second cousins. This was, however, relaxed and the prohibition restricted to those related more nearly than the fourth degree, thus allowing first cousins to marry. There was one restriction to this, however, that if one of the collaterals was removed only in one degree from the common ancestor, he was regarded as a quasi-ascendant and incapable of marriage at any degree: thus a man could not marry his brother's or sister's granddaughter, though related only in the fourth degree. When the Emperor Claudius (A.D. 41–54) married his brother's daughter Agrippina the law was altered, though Gaius [15] says that this alteration allowed marriage only between a man and his brother's daughter, not between a man and his sister's daughter, or his aunt. Constantinus (A.D. 355) restored the ancient law in this respect and forbade marriage with a brother's daughter as incestuous.

Affinity, or the relationship of a person to the kin of his spouse, constituted, though in a more limited degree, a bar to marriage. Intermarriage with affines in the direct line was absolutely prohibited, thus a man could not marry his wife's mother or daughter or his son's wife; but collateral affinity seems to have been no bar in the time of Gaius, though in A.D. 393 Valentinian, Theodosius and Arcadius [16] prohibited marriage with a deceased brother's wife or a deceased wife's sister.

The collateral relationship arising from adoption prevented marriage while the adoption subsisted, so that an adopted brother and sister could not marry. When, however, emancipation had released either party from the *potestas*, the bar was removed. Ascendants and descendants

[15] *Inst.* I, 62. [16] Cod. 5, 5. 5.

by adoption, *i.e.* a man and his adopted daughter or granddaughter, could never marry.[17] In Justinian's time the same incapacity resulted from *cognatio spiritualis*, the relation of godparent and godchild:[18] this, however, brings us to the Christian law, which is outside the matters being considered in this chapter, and will be considered in a later chapter.

Consanguinity being a question of fact, the prohibitions above stated applied to slaves, who are not, of course, relations in the eye of the law: *e.g.* a brother and sister, born slaves, who acquired their freedom could not marry.[19]

Widows were not allowed to re-marry within a certain time after the death of the first husband — ten months under the Republic, later lengthened to twelve months by Imperial legislation. The sanction for this rule, however, was pecuniary and other penalties, not the invalidity of the too hasty second marriage.

No marriage was valid except with the consent of the *paterfamilias*, when the parties were under *potestas*. The power of the *paterfamilias* was in course of time severely restricted, and where his consent was unreasonably withheld, he could be compelled to give it, and in the case of a daughter, provide a dowry.

The minimum age at which marriage was possible was the age of puberty; this very soon became fixed at twelve for a girl, and although fourteen came to be the usually accepted age for a boy, it seems to have been at least theoretically possible that in some cases the question had to be determined by examination. Justinian abolished examination and definitely fixed the age of puberty for boys at the end of the fourteenth year. It is perhaps unnecessary to state that eunuchs, lunatics and idiots were absolutely incapable of marriage.

Lastly it must be noticed that the ancient Romans, throughout their history, were monogamous; though, as we shall presently see, divorce was always allowed and, in some periods of their history, was very frequent.

[17] Gaius, *Inst.* I, 59. Just. *Inst.* I, x, 1. [18] Cod. 5, 4. 26.
[19] Just. *Inst.* I, x, 10.

Divorce

Divorce was recognized and allowed in Rome throughout its history, although the law regulating it, as well as its frequency, varied greatly. In early times when marriage with *manus* was common, the wife, being subject to her husband's authority just as was a daughter, had no say in the matter and could neither divorce her husband nor prevent him from divorcing her, any more than a *filiafamilias* could either compel or prevent her emancipation by her *paterfamilias*. On the other hand there is reason to suppose that divorce was not common or extensive in early times, and further restrictions, in the way of pecuniary penalties, were imposed on husbands who divorced their wives without good reason.

Romulus is said to have ordained that if a man put away his wife except for adultery or one of two or three other very grave offences, he should forfeit his estate, half to her and half to Ceres. We are also told that divorce, except for grave misconduct of the wife, though lawful, was in practice unknown until the second century B.C., and that, until then, any man who put away his wife, on whatever ground, without consulting his family council, was liable to penalties at the hands of the censors.[20]

In marriages which had been contracted by *coemptio* or *usus*, in which the wife was in *manus*, dissolution was accomplished by *remancipatio*, *i.e.* by a fictitious sale into *mancipium*, or bondage, followed by manumission on the part of the fictitious vendee, a form which was exactly the same as the *emancipatio* of a *filiafamilias*, and in which, as above stated, the wife had no more say than the daughter.[21] In the case of marriages by *confarreatio*, a formal act similar but in the

[20] In 206 B.C. the censors removed L. Annius from the senate because he had divorced his wife without laying the matter before the council. The *Lex Maenia* (167 B.C.) — if ever there were such a law — abolished the family council and set up a court of morals nominated by the praetors to fix the pecuniary results of divorce. See Muirhead, *op. cit.* p. 234.

[21] Later, when marriage with *manus* had become practically obsolete, a woman married by *coemptio* could dissolve the marriage by a simple repudiation (*repudium*) and compel her husband to emancipate her. This right belongs, however, to a later period of Roman law than that we have just been considering. And see Gaius, *Inst.* I, 137, a.

opposite sense to *confarreatio* was required. This was called *diffarreatio*, and required the co-operation of the priests, just as did *confarreatio*. This resulted in this particular form of marriage not being dissoluble at will, since the priests could decline to co-operate where there was no proper ground for divorce.

In regard to marriages without *manus*, or free marriages, the rule was quite different. Such a marriage could be dissolved either by mutual consent or by the will of either party. The essential element was the intention to dissolve the marriage, and it was only in order that some certain evidence of so serious a step should exist that Roman law required what was called a *repudium*, or actual notification of such intention to be addressed by one spouse to the other. The *Lex Julia de Adulteriis* (A.D. 18) required the presence of seven witnesses.

The general decline of religion and morals which characterized the later days of the Republic had led to an increasing number of divorces, which led to certain legislation, of which the *Lex Julia* has been noticed. As regards divorce, besides requiring the *repudium* to be given in the presence of seven witnesses, it fixed the consequences of divorce so far as the interests of the parties in the nuptial provisions were concerned. It also penalized the husband who did not divorce his wife taken in adultery. His condonation counted as *lenocinium* (conduct of a pander or pimp), and rendered him liable to the penalties imposed for adultery. He was bound to divorce his wife only when he had caught her in the act: in the absence of this, his complaisance was not punishable unless he were deriving profit from her adultery; conduct regarded as a particularly heinous form of *lenocinium*. Divorce remained, however, very common; it was lawful without any assignable cause, though when blame attached to either side, he or she suffered deprivation to some extent of the nuptial provisions, but there were no other penal consequences.

The early Christian Emperors, though they busied themselves with the matter, never attempted to interfere with the

principle that divorce should be as free as marriage, and independent of the sanction or decree of a judicial tribunal. Justinian was the first who, by one of his *Novels*,[22] enforced a condition on parties to a divorce by common accord, that they should both enter a convent, otherwise the divorce should be null. This law was so unpopular that it was repealed by his successor. The frequency of divorce appears from Jerome's statement that he had seen in Rome a man living with his twenty-first wife, who had herself had twenty-two husbands.

Before leaving the subject of divorce it should be noticed that divorce could also be effected by others than the parties to the marriage. The authority of a *paterfamilias* has already been noticed, and where a son in the power of his father married, the *paterfamilias* could, for a long period of Roman history, dissolve the marriage. Where the marriage was with *manus*, the wife had left her father's authority and come under that of her father-in-law, but in free marriages she remained subject to her own father, who likewise could dissolve the union. There is some doubt as to the extent, if any, to which this right was restricted, but it was not completely abolished until the second century A.D.

In addition to dissolution by death and divorce, marriage might also be dissolved by certain changes in the status of the husband. If he became a slave, *e.g.* by criminal sentence — *capitis deminutio maxima* — his marriage became automatically dissolved, since, as above stated, a slave was not recognized as a person capable of rights. Also if a husband from being a citizen became a colonist of a colony which did not enjoy *connubium*, his civil marriage (*justae nuptiae*) became dissolved, though, if both parties consented, they might continue in gentile marriage (*matrimonium jure gentium*). There are also grounds for supposing that from the early Republic until the time of Justinian the prolonged absence of a husband or wife and ignorance of the spouse at home as to the other's life or death justified re-marriage. Under

[22] *Novels* was the name given to Imperial edicts published after the codification of the law.

a rule established in the reign of Augustus a soldier on the active list was deprived of his *connubium*, which dissolved, or at least suspended, the legal consequences of a marriage contracted before enlistment. This rule, which began to break down in the third century, was completely abolished in the fourth.

Part Two

CHRISTIANITY

CHAPTER IV

THE NEW TESTAMENT

As has been pointed out earlier, Christianity was the completion of Judaism, and it is not possible therefore to regard the Christian law of marriage as a code first instituted during the earthly ministry of Our Lord. Indeed anyone who looked in the New Testament, whether Gospels or Epistles, for a full and self-contained code of law on marriage would be disappointed. The actual passages in the Gospels containing Our Lord's teaching are few, nor do we find therein any directions as to a whole number of important matters on the subject, and the same is true, though to a slightly less extent, of the Epistles. The law of the Christian Church at the present day is, on the other hand, extremely full, often complicated, and differs widely throughout the different branches of the Church.

The different denominations of the Church differ so widely and in such fundamental respects on this subject that, inevitably, the teaching of some of them must be erroneous and contrary, in greater or less degree, to the mind of Christ. It is the duty and the responsibility both of every instructed Christian, as well as of each branch of the Church, to decide as best they may, under the guidance of the Holy Ghost, what is the mind of Christ on this difficult and important subject.

In endeavouring to do this it is important, indeed essential, to study the New Testament teaching on the subject, and especially the recorded utterances of Our Lord. Although we are Christians only through and in the Church, and learn

our religion from the Church and her tradition, the Holy Scriptures are the ultimate court of appeal.

Here (in the Bible) we have then a continual court of appeal. The living Church must do the teaching in every generation, but the written Book must continually test and correct the teaching. The Church must teach, but the Bible must prove. "Do not believe what I say simply," says an old Church teacher and Bishop, Cyril of Jerusalem, in his catechetical lectures, "unless you find the proof of it in the Holy Scriptures." Here is the true ideal — the Bishop or Church teaching: the Bible, continually in the hands of all Church people, keeping the teaching pure.[1]

A. THE GOSPELS.—The actual passages containing Our Lord's teaching are few, and for convenience are here set out; the Revised Version being given.

Matt. v, 27-32. This occurs in the Sermon on the Mount:

Ye have heard that it was said, Thou shalt not commit adultery: but I say unto you, that every one that looketh on a woman to lust after her hath committed adultery with her already in his heart. And if thy right eye causeth thee to stumble, pluck it out, and cast it from thee: for it is profitable for thee that one of thy members should perish, and not thy whole body be cast into hell. . . .

It was said also, Whosoever shall put away his wife, let him give her a writing of divorcement: but I say unto you, that every one that putteth away his wife, saving for the cause of fornication, maketh her an adulteress: and whosoever shall marry her when she is put away committeth adultery.

Matt. xix, 3-12:

And there came unto him Pharisees, tempting him, and saying, Is it lawful for a man to put away his wife for every cause? And he answered and said, Have ye not read, that he which made them from the beginning made them male and female, and said, For this cause shall a man leave his father and mother, and shall cleave to his wife; and the twain shall become one flesh? So that they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder. They say unto him, Why then did Moses command to give a bill of divorcement, and to put her away? He saith unto them, Moses for your hard-

[1] Dr. Charles Gore, *The Creed of a Christian*, 5th ed. p. 65.

ness of heart suffered you to put away your wives : but from the beginning it hath not been so. And I say unto you, Whosoever shall put away his wife, except for fornication, and shall marry another, committeth adultery : and he that marrieth her when she is put away committeth adultery. The disciples say unto him, If the case of the man is so with his wife, it is not expedient to marry. But he said unto them, All men cannot receive this saying, but they to whom it is given. For there are eunuchs, which were so born from their mother's womb : and there are eunuchs, which were made eunuchs by men : and there are eunuchs, which made themselves eunuchs for the kingdom of heaven's sake. He that is able to receive it, let him receive it.

Mark x, 2-12 :

And there came unto him Pharisees, and asked him, Is it lawful for a man to put away his wife ? tempting him. And he answered and said unto them, What did Moses command you ? And they said, Moses suffered to write a bill of divorcement, and to put her away. But Jesus said unto them, For your hardness of heart he wrote you this commandment. But from the beginning of the creation, Male and female made he them. For this cause shall a man leave his father and mother, and shall cleave to his wife : and the twain shall become one flesh : so that they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder. And in the house the disciples asked him again of this matter. And he saith unto them, Whosoever shall put away his wife, and marry another, committeth adultery against her : and if she herself shall put away her husband, and marry another, she committeth adultery.

Luke xvi, 18 :

Every one that putteth away his wife, and marrieth another, committeth adultery : and he that marrieth one that is put away from a husband committeth adultery.

To the above should be added three further passages, one from each Synoptist, recording Our Lord's answer to a question put to him by the Sadducees about the resurrection of the dead, a doctrine which they repudiated. This question was based on the custom, noticed above in Chapter II, of the levirate, and was this : In a hypothetical case of one woman being married in turn to seven brothers, whose wife

would she be in the resurrection? Our Lord's answer is thus recorded.

Matt. xxii, 29 and 30:

But Jesus answered and said unto them, Ye do err, not knowing the scriptures, nor the power of God. For in the resurrection they neither marry, nor are given in marriage, but are as angels in heaven.

Mark xii, 24 and 25:

Jesus said unto them, Is it not for this cause that ye err, that ye know not the scriptures, nor the power of God? For when they shall rise from the dead, they neither marry, nor are given in marriage; but are as angels in heaven.

Luke xx, 34-6:

And Jesus said unto them, The sons of this world marry, and are given in marriage: but they that are accounted worthy to attain to that world, and the resurrection from the dead, neither marry, nor are given in marriage: for neither can they die any more: for they are equal unto the angels; and are sons of God, being sons of the resurrection.

In the course of the history of the Church the meaning and effect of the above passages have been and still are much disputed. The principal matters of controversy are, first, whether the words, found only in S. Matthew, "except for fornication" truly represent Our Lord's teaching or are later glosses; secondly, assuming them to be genuine, what is their true interpretation; and thirdly, whether Our Lord, in speaking on this subject, was laying down a law which His followers must in loyalty obey, or was holding up an ideal, leaving His followers to legislate for themselves with that ideal before them. On this last question, which is probably the most difficult and the most important of all the questions to which these texts give rise, we will only here say that the Church, as a whole, does not give any certain answer, but that we believe, for reasons to be later amplified, that according to the doctrine of the Church of England Our Lord was legislating, and further that, accord-

ing to this same doctrine, the disputed words in S. Matthew do not give liberty to the "innocent" party to re-marry. It is important to observe that if Our Lord were not legislating, but only stating an ideal, in the light of which His followers are to legislate, the true meaning and effect of the excepting words in Matthew become matters of much less vital importance.

There can be no dispute that Our Lord taught that the ideal marriage, after which His followers were bound in loyalty to strive, is an indissoluble union, nor that it is and must be strictly monogamous. It is to be noticed that, in His answer to the Sadducees, Our Lord passes no condemnation or abrogation of the levirate, nor by implication of second marriages.

B. THE EPISTLES.—The Acts of the Apostles records no teaching on marriage, so we turn next to the Epistles.

Rom. vii, 1-3 :

Or are ye ignorant, brethren (for I speak to men that know the law), how that the law hath dominion over a man for so long time as he liveth ? For the woman that hath a husband is bound by law to the husband while he liveth ; but if the husband die, she is discharged from the law of the husband. So then if, while the husband liveth, she be joined to another man, she shall be called an adulteress : but if the husband die, she is free from the law, so that she is no adulteress, though she be joined to another man.

1 Cor. vii :

Now concerning the things whereof ye wrote : It is good for a man not to touch a woman. But, because of fornications, let each man have his own wife, and let each woman have her own husband. Let the husband render unto the wife her due : and likewise also the wife unto the husband. The wife hath not power over her own body, but the husband : and likewise also the husband hath not power over his own body, but the wife. Defraud ye not one the other, except it be by consent for a season, that ye may give yourselves unto prayer, and may be together again, that Satan tempt you not because of your incontinency. But this I say by way of permission, not of commandment. Yet I would that all men were even as I myself. Howbeit each man

hath his own gift from God, one after this manner, and another after that.

But I say to the unmarried and to widows, It is good for them if they abide even as I. But if they have not continency, let them marry: for it is better to marry than to burn. But unto the married I give charge, yea not I, but the Lord, That the wife depart not from her husband (but and if she depart, let her remain unmarried, or else be reconciled to her husband); and that the husband leave not his wife. But to the rest say I, not the Lord: If any brother hath an unbelieving wife, and she is content to dwell with him, let him not leave her. And the woman which hath an unbelieving husband, and he is content to dwell with her, let her not leave her husband. For the unbelieving husband is sanctified in the wife, and the unbelieving wife is sanctified in the brother: else were your children unclean; but now are they holy. Yet if the unbelieving departeth, let him depart: the brother or the sister is not under bondage in such cases: but God hath called us in peace. For how knowest thou, O wife, whether thou shalt save thy husband? or how knowest thou, O husband, whether thou shalt save thy wife? Only, as the Lord hath distributed to each man, as God hath called each, so let him walk. And so ordain I in all the churches. Was any man called being circumcised? let him not become uncircumcised. Hath any been called in uncircumcision? let him not be circumcised. Circumcision is nothing, and uncircumcision is nothing; but the keeping of the commandments of God. Let each man abide in that calling wherein he was called. Wast thou called being a bondservant? care not for it: but if thou canst become free, use it rather. For he that was called in the Lord, being a bondservant, is the Lord's freedman: likewise he that was called, being free, is Christ's bondservant. Ye were bought with a price; become not bondservants of men. Brethren, let each man, wherein he was called, therein abide with God.

Now concerning virgins I have no commandment of the Lord: but I give my judgement, as one that hath obtained mercy of the Lord to be faithful. I think therefore that this is good by reason of the present distress, namely, that it is good for a man to be as he is. Art thou bound unto a wife? seek not to be loosed. Art thou loosed from a wife? seek not a wife. But and if thou marry, thou has not sinned; and if a virgin marry, she hath not sinned. Yet such shall have tribulation in the flesh: and I would spare you. But this I say, brethren, the time is shortened, that henceforth both those that have wives may be

as though they had none; and those that weep, as though they wept not; and those that rejoice, as though they rejoiced not; and those that buy, as though they possessed not; and those that use the world, as not abusing it: for the fashion of this world passeth away. But I would have you to be free from cares. He that is unmarried is careful for the things of the Lord, how he may please the Lord: but he that is married is careful for the things of the world, how he may please his wife. And there is a difference also between the wife and the virgin. She that is unmarried is careful for the things of the Lord, that she may be holy both in body and in spirit: but she that is married is careful for the things of the world, how she may please her husband. And this I say for your own profit; not that I may cast a snare upon you, but for that which is seemly, and that ye may attend upon the Lord without distraction. But if any man thinketh that he behaveth himself unseemly toward his virgin daughter, if she be past the flower of her age, and if need so requireth, let him do what he will; he sinneth not; let them marry. But he that standeth stedfast in his heart, having no necessity, but hath power as touching his own will, and hath determined this in his own heart, to keep his own virgin daughter, shall do well. So then both he that giveth his own virgin daughter in marriage doeth well; and he that giveth her not in marriage shall do better. A wife is bound for so long time as her husband liveth; but if the husband be dead, she is free to be married to whom she will; only in the Lord. But she is happier if she abide as she is, after my judgement: and I think that I also have the Spirit of God.

2 Cor. vi, 14-18:

Be not unequally yoked with unbelievers: for what fellowship have righteousness and iniquity? or what communion hath light with darkness? And what concord hath Christ with Belial? or what portion hath a believer with an unbeliever? And what agreement hath a temple of God with idols? for we are a temple of the living God; even as God said, I will dwell in them, and walk in them; and I will be their God, and they shall be my people. Wherefore, Come ye out from among them, and be ye separate, saith the Lord, And touch no unclean thing; And I will receive you, And will be to you a Father, And ye shall be to me sons and daughters, saith the Lord Almighty.

Having therefore these promises, beloved, let us cleanse ourselves from all defilement of flesh and spirit, perfecting holiness in the fear of God.

Eph. v, 22-33 :

Wives, be in subjection unto your own husbands, as unto the Lord. For the husband is the head of the wife, as Christ also is the head of the church, being himself the saviour of the body. But as the church is subject to Christ, so let the wives also be to their husbands in everything. Husbands, love your wives, even as Christ also loved the church, and gave himself up for it; that he might sanctify it, having cleansed it by the washing of water with the word, that he might present the church to himself a glorious church, not having spot or wrinkle or any such thing; but that it should be holy and without blemish. Even so ought husbands also to love their own wives as their own bodies. He that loveth his own wife loveth himself: for no man ever hated his own flesh; but nourisheth and cherisheth it, even as Christ also the church; because we are members of his body. For this cause shall a man leave his father and mother, and shall cleave to his wife; and the twain shall become one flesh. This mystery is great: but I speak in regard of Christ and of the church. Nevertheless do ye also severally love each one his own wife even as himself; and let the wife see that she fear her husband.

Col. iii, 18 and 19 :

Wives, be in subjection to your husbands, as is fitting in the Lord. Husbands, love your wives, and be not bitter against them.

1 Tim. iii, 2-4 :

The bishop therefore must be without reproach, the husband of one wife, temperate, soberminded, orderly, given to hospitality, apt to teach; no brawler, no striker; but gentle, not contentious, no lover of money; one that ruleth well his own house, having his children in subjection with all gravity.

1 Tim. iii, 12 :

Let deacons be husbands of one wife, ruling their children and their own houses well.

1 Tim. iv, 1-5 :

But the Spirit saith expressly, that in later times some shall fall away from the faith, giving heed to seducing spirits and doctrines of devils, through the hypocrisy of men that speak lies, branded in their own conscience as with a hot iron; forbidding

to marry, and commanding to abstain from meats, which God created to be received with thanksgiving by them that believe and know the truth. For every creature of God is good, and nothing is to be rejected, if it be received with thanksgiving: for it is sanctified through the word of God and prayer.

Heb. xiii, 4:

Let marriage be had in honour among all, and let the bed be undefiled: for fornicators and adulterers God will judge.

1 Pet. iii, 1-7:

In like manner, ye wives, be in subjection to your own husbands; that, even if any obey not the word, they may without the word be gained by the behaviour of their wives; beholding your chaste behaviour coupled with fear. Whose adorning let it not be the outward adorning of plaiting the hair, and of wearing jewels of gold, or of putting on apparel; but let it be the hidden man of the heart, in the incorruptible apparel of a meek and quiet spirit, which is in the sight of God of great price. For after this manner aforetime the holy women also, who hoped in God, adorned themselves, being in subjection to their own husbands: as Sarah obeyed Abraham, calling him lord: whose children ye now are, if ye do well, and are not put in fear by any terror.

Ye husbands, in like manner, dwell with your wives according to knowledge, giving honour unto the woman, as unto the weaker vessel, as being also joint-heirs of the grace of life; to the end that your prayers be not hindered.

It is clear from the above passages that the writers, mostly S. Paul, regarded marriage as an honourable and sacred institution. It symbolizes the union between Christ and the Church, and the mutual love enjoined is quite incompatible with the view, existing we must admit for many centuries among people nominally Christian, that the wife was in some sense the chattel of her husband, and her main duty to be the willing instrument of his desires. It is also to be noticed that those passages in S. Paul which recommend celibacy as preferable to marriage do so because of the peculiar circumstances of the times, and refer almost certainly to

the then expected early end of the world.[2] Also S. Paul is careful to add that he is giving only his personal opinion, not the teaching of Our Lord, and therefore that others may, without ceasing to be good Christians, differ from him in these matters. The passage quoted above, from 1 Tim. iv, seems completely to negative the view that S. Paul regarded marriage as being in any way inferior to or less holy than celibacy. In view of later teaching in the Church, the passage seems markedly prophetic. It is also clear that the writers envisage marriage as an indissoluble union, at any rate when contracted between Christians. The passage in 1 Cor. vii, 15, which later became known as the Pauline privilege, will be considered later: it does not, of course, apply to marriages contracted between Christians. In 2 Cor. vi S. Paul teaches that Christians should not marry "unbelievers", referring to such mixed marriages as "unequal yoking", and the objections he states, in his vivid language, to such are worthy of careful consideration in these times: they will subsequently be considered.

Before leaving the New Testament and proceeding to consider the teaching of the Church, both past and present, we can best summarize what is to be found therein by quoting two paragraphs from the Report of the Commission on Christian Doctrine appointed by the Archbishops of Canterbury and York in 1922:

> The teaching of the New Testament, which clearly has its basis in the teaching of Our Lord Himself, implies that Marriage is in its own principle a lifelong and intimate union, and that anything short of this falls short of the purpose of God. Marriage so understood has the character which enables S. Paul to draw an analogy between it and the union between Christ and the Church.
>
> The above statement expresses the essential principle of marriage, and may be fairly regarded as its theological basis. Further we desire to affirm that in the case of two Christian persons freely undertaking before God to enter on a lifelong marriage union, grace is afforded which, if reliance is fully placed

[2] On "the end of all things at hand", see also 2 Pet. iii, 11 and 1 John ii, 18.

on it, will enable the persons concerned to fulfil the obligations involved and to rise to the opportunities offered in their married life in spite of all difficulties however grave.[3]

[3] *Doctrine in the Church of England* (The Report of the Commission on Christian Doctrine appointed by the Archbishops of Canterbury and York in 1922, 1938, S.P.C.K.), pp. 200-201.

CHAPTER V

THE TEACHING OF THE CHURCH

Preliminary

As we have seen from the passages in the Gospels above set out, Our Lord, in answer to questions, referred back to the original creation of mankind and to the teaching as to the nature and effects of marriage contained in the oldest account of the creation. The Mosaic concession of divorce was, He teaches, a departure from God's original purpose, allowed because of human sin, which now that He has come to restore man to what God meant him to be, will really cease to be applicable. His teaching also seems to involve this: that both with man as God first created him and therefore with man as he would become in consequence of the Atonement, marriage creates such a bond between husband and wife that its dissolution during the lifetime of either is not so much wrong as impossible. It must never be forgotten, though unfortunately it often seems to be, that the Divine or moral law is not a set of rules arbitrarily imposed by a tyrannical God and supported by bribes in the form of promises of future reward for keeping and threats of heavy penalties for breaking, but consists of those rules by which man must live in order that he may be most perfectly man and fulfil the purpose of his creation: and what those rules are obviously God, who made man, knows perfectly, and informs man partly through the instinct and intelligence which He has given him, partly and more fully by revelation.

A Christian marriage, as the Church came to teach, being a union between a man and woman from whom the handicap of original sin has been removed, is therefore similar to marriage as originally instituted. This has been largely regarded as a sacrament, *i.e.* as a union the entry

into which confers grace enabling the parties to fulfil their duties in the married life. In the Church of England marriage is called a " holy estate " and not a sacrament, the latter word being restricted to the two, baptism and holy communion, specifically ordained by Christ as such, which are " generally necessary to salvation ". It seems to us that this is a difference more of words than of substance.

In considering the development of the Church's teaching and practice, it must be remembered that the early Church found herself acting among and drawing her converts from people who were members of an organized, indeed a highly organized State, with its own laws and customs, both regarding marriage as well as the other departments of life. One of the first problems, therefore, was as to the extent to which the new convert could continue to observe the established laws and customs. As we have already seen, the two systems of law — Roman and Jewish — which were those under which practically all the early converts lived, adopted a conception of marriage very different from that which Our Lord declared; the chief difference being in the matter of divorce, which was as easy as marriage itself under the then existing Roman law, and quite reasonably easy under Jewish law. Clearly on conversion difficult cases were bound to arise; one of them is dealt with by S. Paul in 1 Cor. vii quoted above. This conflict between a man's rights and duties as a member of the Church and his rights and duties as a member of the State continued not only after Christianity was tolerated, but for a long time after the conversion of Constantine: it was long before the secular law of marriage became the same as that of the Church, or matrimonial causes came under the exclusive jurisdiction of the Church.[1]

In what follows we shall, of course, be considering the teaching and the law of the Church of England, not exclusively but as one of the great branches of the Church universal, and here we are met with considerable difficulty and some confusion. In pre-Reformation days the distinction

[1] On origin and development of the Church's jurisdiction, see G. H. Joyce, S.J., *Christian Marriage*, p. 214 *et seq.*

between Church and State was virtually non-existent. The State was a Christian State and all its members, at least theoretically, were members of the Church; also although the Spiritualty was concerned with matters ecclesiastical, the Temporalty, in the form of Parliament, in which of course both Spiritualty and Temporalty were represented, often legislated on matters affecting both. The Reformation did not really affect this fundamental conception, and therefore when we find, as we shall, changes in the law of marriage brought about by Parliamentary legislation, it would be wrong to think of such, as we do in present conditions, as legislation by an authority different from the Church and not affecting the law of the Church.[2] Not only was the clergy well represented, by the bishops, in the House of Lords, but until the repeal of the Test and Corporation Acts in 1828,[3] the House of Commons represented both the commonalty of the State and the laity of the Church; the two were the same. It is not until we come to later legislation that we find recognition of the separation of Church and State. Another matter to be noticed is that the Church Courts continued not only after the Reformation, but until the middle of last century, *i.e.* 1857, to exercise exclusive jurisdiction in matrimonial causes. In these matters it may, we think, be said that generally the law in regard to them, except where specifically altered by legislation, remained as it had been before the separation from Rome. As is well known, the Matrimonial Causes Act, 1857, first set up the Divorce Court, now the Probate, Divorce and Admiralty Division of the High Court, and transferred to that Court the jurisdiction of the Church Courts in matrimonial suits. The Act also created a new jurisdiction, to dissolve a valid marriage, leaving the parties free to re-marry. It was, by section 22 of the Act, provided that in all suits other than those to dissolve marriage the Court should "proceed and act and give relief on principles and rules which in the opinion of

[2] See Canon Lacey, *Marriage in Church and State*, p. 177 *et seq.*

[3] About this time, viz. 1836, optional secular marriage, in the Register Office, was first introduced.

the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief". The grounds therefore on which a decree of nullity could be granted were for eighty years precisely those grounds, and only those grounds on which the old Ecclesiastical Courts granted divorces *a vinculo*. It was not until 1937 that Parliament created grounds additional to the old ones.[4] The curious position thus arises that a marriage between two persons, neither of them Christians, can be annulled on grounds certainly originally existing for Christian marriages only. The decisions of the old Ecclesiastical Courts are reported in many volumes of Reports, and so are, of course, those of the Divorce Court; it would seem, therefore, that all decisions of both Courts are declarations of what is the law of the Church on these matters, and the Church has in practice always accepted a decree of nullity pronounced by the Divorce Court.[5] Although it may sometimes seem that these decisions depart from the traditional teaching of the Church — usually in the sense of upholding marriages which might seem invalid on strictly canonical grounds — it must be remembered that the Court's jurisdiction extends to all domiciled Englishmen whether they be members of the Church of England or not, and whether they be Christians or not, and it would have been not only wholly impracticable but also unjust if rules really applicable only to Churchpeople had been enforced on all alike. These kind of considerations, though theoretically irrelevant, cannot fail unconsciously to affect judges faced with the task of discovering the law: also it must be remembered that judges are not canonists.

Although some canonists in the Church of England hold that the decisions of the secular Courts cannot bind the Church or her members, two matters must be observed. In the first place the Divorce Court, in conformity with its statutory duty, has in these cases gone fully into the old

[4] See as to this Chapter VIII.

[5] This may no longer be so where the ground of the decree is one of the new statutory grounds.

law, as formulated by the ecclesiastical Courts before 1857, and has purported to decide in conformity with that law: at the lowest, therefore, the decisions of the Divorce Court afford very strong evidence of what is the law of the Church, even if that law be regarded as, in a sense, foreign law, which the Divorce Court has to determine. In any case in which the law of a foreign country is in question, the English Court decides what it is as a question of fact, after hearing expert evidence. In the second place, as already stated, the Church of England has, in practice, accepted the decrees of nullity pronounced by the Divorce Court. This course was necessitated by the fact that the Church has not, since 1857, possessed any tribunal before which such cases could be brought; also, since the usual ground for such decrees is impotence or incapacity, unquestionable ecclesiastical grounds, the Church could safely accept them, not doubting that the Divorce Court had fully and properly investigated the facts. Such decisions of the Divorce Court as appear to depart from the canon law have, as already stated, been in the direction of upholding marriages, not of annulling them. By reason of the above we will take it that the decisions of the Divorce Court, on questions of the validity or invalidity of marriage, authoritatively declare the law of the Church of England, although in strict theory such an assumption may be open to question. This, of course, will not apply to decisions based on specific legislation on such matters as dissolution of marriage and prohibited degrees where the statutes provide otherwise; nor to the additional grounds rendering marriage voidable contained in the Matrimonial Causes Act, 1937.

We will now try to trace the teaching and practice of the Church, as it gradually became systematized, under the following heads:

The persons competent to contract marriage.

The constitutive factors of marriage.

Nullity and Divorce.

Mixed marriages, the re-marriage of converts and marriages of the heathen.

Persons competent to contract Marriage

(i) Both parties must be Christians, *i.e.* baptized persons.

We do not propose to examine in detail the evidence, in the way of the ancient authorities, for the development of the teaching and mind of the Church on this, or indeed on any of these matters. Such a detailed examination can be found in many learned works, and all that we propose is to try to state shortly and accurately the conclusions to which the authorities seem to lead. It should, however, be pointed out that S. Paul, in the passage from 2 Cor. vi, 14 quoted above, seems thoroughly to reprobate marriages between Christians and unbelievers. Also the symbolism in Eph. v, 22-33 seems inapplicable to marriage between a Christian and a non-Christian. It further seems worthy of note that the statement in the report of the Archbishops' Commission on Doctrine in the Church of England (*supra*, p. 47) limits the grace conferred to marriages between Christians.

Naturally in the early Church mixed marriages occurred; more so because of the practice which then existed of persons who had been instructed in and assented to the faith putting off baptism until late in life, sometimes until the death-bed, in order to be free to continue that enjoyable but sinful course of life which would, if indulged in after baptism, have been thought fatal to ultimate salvation. In this connexion it must be remembered that the question of what mortal sins committed after baptism could receive pardon, and how often, was as yet unsettled.

On this question we cannot do better than quote the authority of Mr. Watkins: summing up the teaching of the West after Justinian, he writes:

> From the time of Justinian it is on the whole true to say that the tendency was to restore the primitive condemnation of mixed marriages. For some centuries it would appear that notwithstanding peremptory prohibitions, a marriage between a Christian and a non-Christian was not regarded as essentially null and void. As, however, larger powers of discipline were achieved, this result was at length attained, and still remains, under ordinary circum-

stances, the ecclesiastical law of Western Christendom. The phrase " under ordinary circumstances " has to be inserted, because the comparatively recent practice of Papal dispensation has introduced exceptions.[6]

The question of the necessity of both parties being baptized is closely involved with that of the re-marriage of converts, and what is known as the Pauline privilege. The passage concerned is 1 Cor. vii, 12-16 (given in full *supra*, p. 43). The construction of this passage is not free from difficulty, and is and has been the subject of differing views; but one thing appears clear, that the absolute indissolubility of marriage between two Christians has not, in the teaching of the Church, been held to apply to marriage between a Christian and a non-Christian.[7] In the theology of Roman Catholics and of those who accept the view that marriage is a sacrament, the technical explanation appears to be that as the ministers of the sacrament are the parties to the marriage there is, in such a marriage, no sacrament, since no unbaptized person can be its minister.[8]

Summing up the conclusions as to the teaching of the Church on both these matters, Mr. Watkins writes:

Broadly speaking, the results of eighteen and a half centuries of Christian teaching and practice are that —

A. In the West, married converts may obtain a divorce with right of re-marriage
   1. If the unbeliever refuse to abide;
   2. If he will not abide without " contumely of the Creator ";
   3. If he will not abide without soliciting the Christian partner to the commission of mortal sin.

   In the East, the mere refusal of the unbelieving partner to be converted is held to be an adequate ground of divorce, with right of re-marriage.

B. In the East and West alike, marriages between baptized persons and persons unbaptized stand prohibited, but in

[6] O. D. Watkins, *Holy Matrimony*, 1895, pp. 572-3.
[7] See *infra*, p. 100.
[8] See also Dom Charles Augustine, *A Commentary on the New Code of Canon Law*, Book iii, Vol. v, 1929, p. 14.

the later Western Church a power of Papal dispensation has been sometimes assumed ".[9]

It should be stated that the old law of the Church of England on this question seems obscure, probably because the question has seldom, if ever, arisen. There seems no trace of Jews living in this country before the Norman Conquest, when they were brought here from Normandy, and they were expelled in 1290. Before this expulsion they had been forbidden, *inter alia*, to keep a Christian servant, or to have intercourse with Christian women.[10] Lord Coke writes :

I find that by the ancient law of England, that if any Christian man did marry with a woman that was a Jew, or a Christian woman that married with a Jew, it was felony, and the party so offending should be burnt alive.[11]

On p. 572 of his book — already referred to — Mr. Watkins quotes the views of Sir Walter Phillimore, who suggests that in many such cases the marriage would be a nullity on the grounds stated by Lord Penzance in Hyde *v.* Hyde & Woodmansee.[12]

Apparently the Canon Law Committee of the English Church Union reported on 16th June 1891 that a marriage between a baptized Christian and an unbaptized person was valid but irregular.[13] On the hypothesis above stated, that the decisions of the Divorce Court declare the present law of the Church of England, such a marriage is valid. The Court has more than once so declared.[14] Marriages contracted in a country which allows polygyny according to the laws of

[9] Watkins, *op. cit.* p. 579.

[10] Pollock and Maitland, *History of English Law*, 2nd ed. vol. i, p. 468 *et seq.*

[11] 3 *Inst.* p. 89. Coke does not tell us whether the party " so offending " meant the Jew, as the more appropriate, the man on the presumption that he had over-persuaded the weaker sex, or the Christian, as the party who had disobeyed the Church. See also Pollock and Maitland, *op. cit.* 2nd ed. vol. ii, p. 394, where it is stated that " it is probable that in their dealings with Jews the English Courts accorded this privilege (Pauline) to the faithful ".

[12] 1866, L.R. 1 P. & D. p. 130. For facts of case see *infra*, pp. 99-100.

[13] See Phillimore, *Ecclesiastical Law*, 2nd ed. vol. i, p. 563.

[14] See *e.g.* Brinkley *v.* Attorney General, (1890) 15 P.D. 76 (marriage to Japanese woman), and Chetti *v.* Chetti, 1909 P. 67 (marriage contracted in England between Hindu and Englishwoman).

that country have been held invalid, but on another ground, viz. that the subject matter of the contract was other than what this country, together with Christendom as a whole, regards as marriage. Such a case was Hyde *v.* Hyde & Woodmansee.

It appears to be doubtful whether a parish priest could lawfully refuse to marry two persons solely on the ground that one was not baptized : we have not, however, succeeded in finding any definite decision on the point. Obviously the question can seldom arise before a Court, since even if a priest were satisfied of the fact, which is, it must be remembered, a negative fact,[15] it would hardly ever happen that the parties would take proceedings : they could not in any event, we think, recover pecuniary damages, the usual object of litigation.

In spite of the present state of the law of the Church of England, a position resulting almost entirely from the imposition of Church law on the whole State, it is clear that the mind of the universal Church is very much opposed to such mixed marriages, which are also strongly reprobated by S. Paul. We think there can be no doubt that the Church of England could, if she were so minded, without disloyalty to her catholicity, altogether forbid them to her members.

(ii) Neither party must have a spouse living.

As we have already seen, monogamy was at all times enjoined by the Roman law, and under Jewish law, although polygyny remained lawful until much later, it had in fact become nearly non-existent in Our Lord's day. Under those systems a divorce put an end to marriage, leaving the spouses free to re-marry, but under Roman law no man could have two or more wives at a time.

As we have said, monogamy is inherent in the Divine institution, and was always enjoined by the Church, which in this respect was able to accept the Roman law. The question of re-marriage after divorce will be later considered.

[15] We don't feel at all sure on which side would lie the burden of proof in such litigation, *i.e.* on the plaintiffs to prove that they had been baptized, or on the defendant (priest) to prove that they, or one of them, had not,

(iii) Both parties must be of requisite age.

Under both Roman and Jewish law, as has been noticed, the requisite age of marriage was the age of puberty, and this had been finally fixed at fourteen in a boy, twelve in a girl. This rule was accepted by the Church. In the Middle Ages the custom of child betrothal was frequent, and the Church followed the Roman law by allowing it as from the age of seven; before that age she declared it a nullity. Such betrothals did not, however, operate as binding marriages, and could be repudiated on the parties attaining the required age.

The Roman Catholic Code of 1917 has raised the age to sixteen and fourteen respectively.[16] In England the age, which had remained that of the old law, was in 1929 raised to sixteen for both sexes, and any marriage to which either party is under that age is made absolutely void.[17] We do not suppose that any Churchman feels any difficulty in accepting these ages as eminently reasonable.

(iv) The parties must not be within the prohibited degrees.

CONSANGUINITY.—We have already noticed that, from the earliest times, the intermarriage of those nearly related has been contrary to the general feeling of mankind, and also the rules which gradually became standardized in Roman law. In Chapter II we examined the prohibitions contained in the Mosaic Code, and the Jewish law and teaching on the subject. Speaking very generally, the Church adopted the teaching of the Old Testament, and at times very largely extended the degrees within which she forbade marriage. Without going into details, we may notice that at one time in the West any marriage was regarded as illicit which fell within the seventh degree of canonical reckoning,[18] *i.e.* sixth

[16] Canon 1067.

[17] Age of Marriage Act, 1929, which received the Royal Assent on 10th May 1929, and came into immediate operation.

[18] There are two methods of reckoning relationship: (i) the Roman way, by counting up to the common ancestor and down to the relation: so brother and sister are related in the second degree, and so on (see *supra*, p. 32); (ii) the German or canonical way, by counting persons in one line only, omitting the common ancestor; so brother and sister are in the first degree, second cousins in the third, etc. For a fuller explanation see Joyce, *op. cit.* p. 509 *et seq.*; also Pollock and Maitland, *op. cit.* vol. ii, p. 386.

cousins. The Lateran Council of 1215 restricted the impediment to the fourth degree, *i.e.* third cousins. In the East, too, the tendency was towards multiplying prohibitions, though the Eastern Church seems to have been content to stop short at the seventh degree of Roman computation, *i.e.* second cousins once removed. The present rule in the Orthodox Church is that the prohibition extends to the sixth degree (second cousins), though exceptionally the Church allows marriage in the sixth degree, but never nearer.[19] The Russian Church under the Tsars allowed marriage in all degrees beyond the fourth (first cousins), and this still seems to be the rule of that Church.[20] Under a law published in 1939 by the Greek Government, marriage is prohibited only to the fourth degree inclusive, *i.e.* all beyond first cousins may marry.[21]

In the West a great change occurred in the thirteenth and fourteenth centuries. Up till then the Levitical prohibitions had generally been regarded as part of the Divine law, of what the seventh Article [22] calls the " Commandments which are called Moral ", binding therefore on all men at all times, and beyond the power of the Church to alter. In the fourteenth century this assumption began to be seriously questioned by the Schoolmen, led largely by Duns Scotus. The general conclusion was then arrived at that it could not reasonably be maintained that the law of nature proclaimed every union mentioned in Lev. xviii to be utterly repugnant and always inexcusable, and that, therefore, their prohibition could not be classed among the moral precepts. In so far therefore as they ranked among the diriment impediments, this was due to ecclesiastical, not Divine law. The result of this view, which gradually became accepted, was twofold : first, that the Church was competent to alter, by restricting or enlarging, the prohibited degrees ; secondly, that even within the prohibited degrees the Church could, for any cause regarded as sufficient, dispense with the pro-

[19] Report of Palmer Commission (see *infra*, p. 66), p. 140.
[20] Joyce, *op. cit.* pp. 552-3.
[21] Report of Palmer Commission, p. 140.
[22] Of the XXXIX Articles of Religion.

hibition in a particular case. In fact from about the beginning of the fifteenth century we find growing up the practice of Papal dispensation. The decree Tametsi of the Council of Trent anathematizes any who say " that the Church cannot dispense in some of these (degrees of consanguinity and affinity) or decree that other degrees beyond these should hinder or annul marriages ". This clearly implies that there are some prohibited degrees from which it is beyond the competence of the Church to dispense, presumably because they are enjoined by Divine law; but the Roman Church has never formally pronounced what these are. The general view seems to be that the only marriages contrary to Divine law and beyond the power of the Church to sanction are those between parent and child and between brother and sister: and these are the only ones in respect of which no dispensation seems ever to have been given.[23] Under the Code of 1917 the impediment extends to the third degree, *i.e.* second cousins.

AFFINITY.—The impediment arising from affinity was also taken from Lev. xviii and was also, in both East and West, carried to great lengths; indeed so far as affinity of the second and third kinds.[24] This was very largely restricted by the decrees of the Lateran Council in 1215, which swept away affinity of the second and third kinds and restricted that of the first kind to the first four degrees of canonical computation, *i.e.* the same as in consanguinity. In the West there had grown up, apparently from the seventh century, the opinion that the impediment of affinity arose from the physical union between husband and wife, and that it could arise, therefore, from such union outside marriage: this was called affinity *ex copula illicita.* This impediment, though restricted by the Council of Trent to the second instead of the fourth canonical degree, persisted until 1917.

[23] See Joyce, *op. cit.* pp. 524-6.

[24] Affinity of the second kind, or genus, is the affinity between a man and the affines — of the first genus — of his wife; *e.g.* the wife of his wife's brother. That of the third kind, or genus, arises when a person who is connected with a man by affinity of the second kind is left a widower and re-marries. His new wife becomes a third-kind affine to the man. See Joyce, *op. cit.* p. 539, and Pollock and Maitland, *op. cit.* vol. ii, p. 388.

The Code of that year abolished the impediment, declaring that affinity arises from a valid sacramental marriage, whether consummated or not. Under that Code the impediment of affinity extends to all degrees in the direct line; in the collateral line only to the second degree.[25] This Code, though it abolished affinity *ex copula illicita*, has to some extent reintroduced it in a different form, under the head of an impediment based on public propriety: Canon 1078 declares that this impediment arises "from invalid marriages, whether consummated or not, and from public or notorious concubinage; and it annuls marriage in the first and second degree of the direct line between the man and the blood relations of the woman, and vice versa".[26]

In the East affinity extended to the same number of degrees as consanguinity. Also the kindred of the husband became affines to the kindred of the wife, the degrees being computed by adding together the degrees of consanguinity of the two persons to husband and wife respectively. Thus the husband's first cousin (fourth degree) and the wife's sister (second degree) were affines in the sixth degree.[27] In the East affinity arose from marriage, never *ex copula illicita*. Spiritual relationship went even further than in the West, not only godparents and godchild, but the godparents of the same child being regarded as related, not only to one another, but to their respective natural relations.

In the last eighty years the rules of the Eastern Church have been largely revised. The Orthodox Church's present rule generally permits marriage in the sixth degree of collateral affinity, and sometimes even in the fifth degree. The absolute prohibition extends, therefore, only to the fourth degree. The Orthodox Church still retains the impediment of affinity involving three families: the practice is thus stated by the Metropolitan of Thyateira:

Until the thirteenth century marriages had been prohibited in the first degree of affinity involving three families — *i.e.* the

[25] Canon 1077.

[26] A very similar impediment is recommended by the Palmer Commission: Report, p. 83.

[27] Joyce, *op. cit.* p. 555.

marriage of the stepfather with the wife of the stepson and the marriage of the stepmother with the husband of the stepdaughter. Later, in order to avoid the confusion of names, marriage was prohibited where the affinity was near. Impediments to marriage arising from affinity involving three families are limited to the third degree, and this rule is in force today everywhere.

The new Greek civil law (see *supra*, p. 59) forbids marriages between any two persons related to one another by affinity in the direct line in any degree, or in the collateral line as far as the fourth degree inclusive. The same law prohibits marriage of any ascendant or descendant or brother or sister of a husband with any ascendant or descendant or brother or sister of his wife.

As regards spiritual affinity marriage is forbidden between the godfather and (*a*) godchild, (*b*) godchild's mother, (*c*) godchild's daughter; and between the son of a godfather and (*a*) godchild, (*b*) godchild's mother, (*c*) godchild's daughter. Corresponding prohibitions apply to persons of the opposite sex. The new civil law above mentioned prohibits only marriages between a godparent and his godchild or that godchild's parent.[28] This civil law also contains prohibitions based on adoption and, to a more limited degree, on guardianship. These, however, do not really concern us.

In the Church and by the law of Scotland there exists, at least in theory, a prohibition based on public propriety. As we shall see later, divorce with right of re-marriage has existed in Scotland and has been recognized by the Church of Scotland since about the latter half of the sixteenth century, but under an Act of 1600, a woman divorced because of her adultery may not marry her paramour. This is, apparently, now a dead letter, being got round by omitting the name of the paramour from the decree dissolving the marriage.[29] As we have already seen (*supra*, pp. 17 and 21), this was also the Jewish law.

[28] The above statement of the teaching of the Orthodox Church is taken from the Report of the Palmer Commission, p. 139 *et seq.*

[29] See *Ency. of Laws of Scotland*, vol. vi, p. 25, *sub nom.* Divorce.

As has been seen, in Roman law adoption caused an affinity which created certain impediments to marriage. By analogy with this, there arose the teaching that an affinity, called spiritual affinity, arose between a sponsor at a person's baptism and the person baptized. At the time that the prohibited degrees of consanguinity and affinity were being multiplied, the same multiplication of impediments from spiritual affinity was introduced, so that, *e.g.*, a man could not marry the second cousin of his godchild. It seems also to have been held to extend to sponsors at confirmation and to the relationship of priest and penitent in the sacrament of penance. The modern Roman Catholic law regards spiritual affinity as arising only from baptism, and as existing only between the baptizing minister and the baptized person, and the sponsor and the baptized person.[30] As regards the impediment arising from adoption, the Roman Code accepts the civil law of any country, so that in a country whose law forbids marriage between persons connected by adoption, the Roman Church also forbids such marriages.[31]

Although, as we have seen, the Church gradually came to the view that dispensation from the impediments of consanguinity and affinity could, in particular cases, be granted, there can be no question but that the extremely wide range of these prohibitions resulted in grave abuses. Populations were, in the Middle Ages, relatively stationary, and this, together with the strong customary class distinctions, often compelled marriages within the prohibited degrees. Usually, no doubt, a dispensation was obtained, but often the relationship, especially when we remember both the number of degrees to which the prohibition extended and that affinity arose both spiritually and *ex copula illicita*, was unknown or unsuspected. This created a loophole in the case of unhappy marriages, as well as making many marriages precarious, since once the impediment was discovered either party could obtain a decree of nullity. As Sir Lewis Dibdin writes:

> These elaborate and highly artificial rules produced a system under which marriages theoretically indissoluble, if originally

[30] Canons 1079 and 768.

[31] Canons 1059 and 1080.

valid, could practically be got rid of by being declared null ab initio on account of the impediment of relationship. This relationship might consist in some remote or fanciful connection between the parties or their godparents, unknown to either of them until the desire to find a way out of an irksome union suggested minute research into pedigrees for such a relationship — a research which somehow seems to have been generally successful.[32]

The Reformers, in a natural reaction against these abuses, went to a somewhat extreme view in the opposite direction. Generally speaking, they taught that the Levitical prohibitions belong to the law of nature, must be extended to analogous cases,[33] and cannot be dispensed either generally or in particular cases. The Church of England accepted this view, and her teaching is set out in canon 99 of the Canons of 1603 :

No person shall marry within the degrees prohibited by the laws of God, and expressed in a Table set forth by authority in the year of Our Lord 1563. And all marriages so made and contracted shall be judged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties shall by course of law be separated. And the aforesaid Table shall be in every Church publicly set up and fixed at the charge of the parish.

This Table is the one found at the end of the Book of Common Prayer. The general effect is that it prohibits all marriages within the third degree (Roman or civil computation) of consanguinity and affinity. Outside those degrees all are absolutely free to marry, and no authority can sanction marriage within them. As the Table contains no mention of spiritual affinity, that impediment does not exist in the Church of England. Consanguinity is a question of fact, and obviously exists as much between illegitimate as legitimate relations.[34] The impediment of affinity does not arise *ex copula illicita*, or intercourse outside marriage.[35]

[32] Sir Lewis Dibdin and Sir Charles Chadwyck Healey, *English Church Law and Divorce*, 1912, p. 24.

[33] Luther taught that the Levitical prohibitions should not be extended, and that as these did not prohibit the marriage of uncle and niece, such marriage was lawful. His teaching on this was not, however, generally accepted.

[34] R. *v.* Inhabitants of St. Giles in the Fields, (1847) 11 Q.B. 173.

[35] Wing *v.* Taylor, (1861) 2 Sw. & Tr. 278.

Until 1835 consanguinity and affinity rendered a marriage voidable only, and such marriages therefore could only be annulled by sentence of nullity during the lifetime of the parties. By an Act — 5 & 6 Will. IV, c. 54 — passed in that year, it was provided that all marriages previously celebrated between persons within the prohibited degrees of affinity should not thereafter be annulled, and that all marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity should be absolutely null and void.

The Table of 1563 no longer represents the secular law of the State; since 1907 that law has gradually been altered by removing the prohibition in certain cases of affinity. This will be noticed in detail when we come to state the present legal position in England.

As we have said, at the time of the Reformation the Church of England, in common with the other reformed Churches, seems to have taken the view that the Levitical table of prohibited degrees, extended to analogous cases, was part of the Divine law, and beyond the authority of the Church to alter, either way, and either generally or in specific cases. This too is clearly the opinion of Mr. Watkins, writing in 1895; for at p. 647 of his work, already quoted, he writes:

> in reaching this table [of 1563] we do in fact reach the complete statement of Divine law on the matter. Christianity has nothing to add to it, nor may it take aught away.

This view is not now, we think, widely held, and probably today most Churchmen, and indeed most Christians, would say that the question was within the power of the Church to reconsider. The Joint Committees appointed by the Convocations of Canterbury and York reported in 1935 that

> our own study of the question has led us to the opinion that the Table of Affinity presupposes that a principle lies behind the prohibition in Leviticus which is not to be found there, and that in consequence the Table should receive full and careful investigation and reconsideration by the Church.[36]

[36] Report of the Joint Committees, p. 29.

At the end of the year 1937 the Archbishop of Canterbury appointed a Commission, under the chairmanship of Dr. E. J. Palmer, formerly Bishop of Bombay — to which for brevity we shall hereafter refer as " the Palmer Commission " — to " consider the subject of the impediments to marriage constituted by certain relationships of consanguinity and affinity ". The object was to have a Report for consideration by the Lambeth Conference, which was to meet in 1940. Owing to the war the Conference did not meet, but the Report of the Palmer Commission was published in 1940. This is an exhaustive and highly instructive document which deals fully with the matters from all points of view, largely from that of the problems arising in the mission fields, with which we are not here directly concerned. On the question of principle the Report agrees with the Joint Committees : *i.e.* at p. 61,

> It is our view that the Levitical legislation on this matter belongs to the class of judicial precepts ;

and later (p. 63),

> It is impossible to maintain that the Anglican Churches had and have no right to take independent action on the matter of the prohibited degrees. This applies both to the action taken by the Church of England at the Reformation and to any action which the Anglican Churches might take now.

The actual recommendations of the Palmer Commission will be considered later, in Chapter IX. Joint Committees of the two Convocations, under the chairmanship of the Bishops of Guildford and Manchester, are now sitting and considering the question of affinity. Before very long — possibly before this appears in print — we may have their Report.

It is, we think, worth noting that the attitude of the Protestant Churches in the British Isles confirms our statement that Christendom as a whole does not now regard the Levitical degrees as part of the Divine law, binding all men at all times. The evidence is set out at pp. 52 and 53 of the Report of the Palmer Commission, which summarizes the general result as being

(*a*) that the non-Episcopal Churches of the British Isles have not in recent years paid much attention to the subject of these prohibitions of marriage, and (*b*) that none of them have regarded the changes made in English Statute law during this century as matters for condemnation or regret.

The four requisites above mentioned appear to be those common to the universal Church. For the sake of completeness we should add that there are others existing in the Church of Rome. The Roman Code (of 1917) divides impediments into two kinds, prohibitive and diriment; the former, which are vows, legal adoption (but only if and to the extent prohibited by the civil law of the country), mixed religion [37] and public sin and censure, do not invalidate the marriage if contracted, but merely prohibit it, presumably under pain of sin. The latter, diriment impediments, not only forbid but invalidate marriage. It must be remembered that impediments of either kind, with a few exceptions which have never been authoritatively defined, are capable of dispensation. The prohibitive impediments are outside the scope of this book and will not be considered: [38] the diriment impediments, in the order in which they appear in the Code, are: (i) age, (ii) impotency, (iii) bond of existing marriage, (iv) disparity of worship, (v) sacred orders, (vi) religious profession, (vii) abduction, (viii) crime, (ix) consanguinity and affinity, (x) public propriety, (xi) spiritual relationship, (xii) legal adoption. Of these (v) and (vi) are really outside the purpose of this book to consider, as they very little affect the Church of England: (i), (iii), (iv), (ix), (x), (xi) and (xii) have already been considered, (ii) will be dealt with under Nullity and (vii) under Consent. This leaves only (viii), the impediment of Crime. This is an old-established impediment, first heard of about the end of the ninth century: [39]

[37] This means marriage between a Roman Catholic and a non-Roman Catholic Christian. As between baptized and unbaptized persons the impediment, *disparatus cultus*, is diriment.

[38] There are in effect certain prohibitive impediments in England; *i.e.* the necessity of parent's consent in the case of minors; necessity of two witnesses, and of residence; also of the use of the true names in marriage by licence. The absence of these requirements does not invalidate the marriage. See further, Chapter VIII, *infra*, pp. 103 and 112.

[39] Augustine, *Commentary on the New Code of Canon Law*, p. 196.

it will suffice to set out the terms of the Canon (No. 1075) which contains it :

There can be no valid marriage between :

1. Those who, during the same legitimate marriage, have committed adultery with and promised marriage to each other or attempted it, even by a merely civil act ;
2. Those who during the same legitimate marriage have committed adultery together and one of them conjugicide ;
3. Those who, even without adultery, caused the death of a partner by mutual co-operation, either physical or moral.

It seems difficult to imagine that, under modern conditions and certainly in this country, the question could arise in cases 2 and 3, where the husband or wife had been murdered.

CHAPTER VI

THE TEACHING OF THE CHURCH (*continued*)

The Constitutive Factors of Marriage ; the Parties being Competent, as above

A. ESSENTIAL : (i) *Consent.*—The secular law governing the members of the early Church was the Roman law : the old Roman marriage by *confarreatio* and *coemptio* had by then become obsolete, and the law was that provided the parties were " legally capable of intermarriage, and intended immediately beginning cohabitation, any declaration of consent, in whatever form given, sufficed for a legal marriage ".[1]

But, as we have also observed, the fact that the law did not require any formality did not mean that in practice ceremonies were not commonly held. In fact both the law and custom of Rome were almost bodily taken over by the Church. To quote Mr. Watkins :

> It is impossible to understand the significance of the testimony of history upon the subject of the essentials of Christian marriage without a clear grasp of the requirements of Roman law, and of the chief features of Roman custom. The Christian Church for many centuries simply accepted and conformed to the Roman law and Roman customs so far as was compatible with Christian views, commonly confirming the union by religious benedictions. Now it cannot be too clearly stated that in the Roman law the one essential feature of marriage was the mutual consent of the parties.[2]

The dictum of Ulpian, " *nuptias non concubitus sed consensus facit* " (consent, not cohabitation makes a marriage), became accepted as an axiom of the Church's law, though as Mr. Watkins points out,[3] at that time the parties were as free to rescind their contract by mutual consent as they had been to form it.

[1] *Supra*, p. 29. [2] Watkins, *op. cit.* p. 78.
[3] Watkins, *op. cit.* p. 79.

It is undoubtedly true that, for about the first thousand years of the Christian era, consent, and consent alone, was regarded by the whole Church as the only essential to a valid marriage, though priestly benediction was very much encouraged and was in fact the usual accompaniment. To quote Mr. Watkins again :

> Summing up the evidence for the first thousand years of Christianity, it may be said to be sufficiently clear: (1) That where a marriage had been celebrated by Christians with the usual civil forms, there being no bar which, by Christian rule, would hinder the marriage, it was accepted as valid, and no priestly benediction was required as a condition of validity. (2) That, notwithstanding, from the earliest age of Christianity the priestly benediction was a usual accompaniment of marriage between Christians.[4]

Father Joyce writes :

> Christians would appear from the very first to have hallowed their marriages by acts of religion. The Church gave her solemn benediction to the bridal pair : and the Mass formed the chief feature of the nuptial celebration. References to the part taken by the priest or bishop in the solemnization of Matrimony occur from the second century onwards. But . . . the Church taught that the constitutive factor of marriage lay, not in the benediction, but in the mutual consent of the parties, and that this sufficed to form a marriage even though no priest were present. Throughout the Middle Ages she enjoined the public religious celebration of marriage with ever-increasing stringency, and under pain of grave ecclesiastical penalties. But even where her commands were flouted, she did not question the validity of the union.[5]

After the end of the ninth century, the Church, the different branches at different times, imposed obligatory ceremonies for the solemnization of marriage, the absence of which invalidated the marriage: this development will be later described, but whatever ceremonies were imposed, the Church remained constant in her rule of the absolute necessity of the consent of the parties.

[4] Watkins, *op. cit.* p. 101.

[5] Joyce, *op. cit.* p. 102. See also Pollock and Maitland, *op. cit.* vol. ii, p. 368 *et seq.*

We will now consider the teaching of the Church as to the nature and content of this consent. Shortly stated, the consent must be free, mutual, directed to marriage as understood by the Church, and intended to be immediately operative.

Consent is not free, and therefore no valid marriage results, where it is given by a person mentally incapable of so doing. A lunatic or mental defective cannot therefore consent; and a person might be in such a state of intoxication as to be incapable of giving consent. In all such cases the pretended marriage would be null, owing to the absence of any really free consent. Again, consent induced by force or fear (*vis et metus*) is not in truth consent at all, and cannot constitute marriage. A very similar impediment is that known as abduction (*raptus*). This does not mean ravishment of the woman, but her being taken to and kept in a place where she is no longer free with a view to forcing her to marry the abductor. Marriage under such circumstances is not free, and is therefore null.

Consent must be mutual, and the errors which prevent this can be classed thus:

(*a*) Error as to the person, viz. where A goes through the ceremony of marriage with C believing that she is, and intending to marry B. This error invalidates the marriage.

(*b*) Error as to condition. As we have seen, by Roman law a slave could not contract marriage. The Church for some time had to accept this rule, but even after she managed to abolish it, a ceremony of marriage gone through between A (a free man) and B, A believing B to be free when in fact she was a slave, was held to invalidate the marriage. Obviously the matter is now almost obsolete, but the Roman Catholic Code still retains the impediment, limited to those cases where (in the above hypothetical case) B " is a slave in the true sense of the word ".[6]

(*c*) Error as to the quality or character of the other party. This error does not invalidate the marriage, except where it is of such a kind as in truth to amount to an error as to the

[6] Canon 1083, par. 2. 2.

person, when it would do so under (*a*) above. It has sometimes been suggested by writers that a woman's concealed pregnancy by another man should avoid the marriage. Although this was the teaching of both Luther and Calvin, it was never accepted by the Catholic Church, nor by the Church of Scotland, which otherwise, as we shall see later, adopted into her law the teachings of Calvin. In the East, as we shall see, it was at one time, and fairly recently, a ground for divorce, and it has been made a ground of nullity in English law by the Matrimonial Causes Act, 1937.

An important, indeed a vital requisite of the consent is concerned with what may be called its content. Besides being free and mutual, the consent must be directed to marriage as understood by the Church: this has been defined as " the voluntary union for life of one man and one woman, to the exclusion of all others ".[7] The working-out of this requirement has occasioned many distinctions and refinements, some of which may appear over-refinements. Without examining these, we may summarize by saying that, generally speaking, consent is, in this respect, considered insufficient —

(*a*) Where there is a mistake as to the nature of the ceremony, *e.g.* where it is believed to be, whether by one party or by both, only a betrothal.[8]

(*b*) Where the contract entered into was for a polygynous, or potentially polygynous union.[8]

(*c*) Where the contract is expressed to be for a fixed time only, or where it is mutually agreed to be dissoluble in certain circumstances.

(*d*) Where it is mutually agreed that there shall be no right to physical intercourse.

Finally, to operate as a marriage, the consent must be intended to take effect at once. As it is said, it must be *per verba de praesenti.* A consent to take effect in the future is merely an engagement, *i.e.* a contract to get married at a future date. Such a contract, *per verba de futuro,* could,

[7] Per Lord Penzance, in Hyde *v.* Hyde & Woodmansee, L.R. 1 P. & D. at p. 133.

[8] See *infra,* Chapter VIII, p. 105.

however, be turned into a marriage if followed by cohabitation and *copulatio carnis*.

The question of consent, and the circumstances rendering it defective, will be further considered under nullity (*infra*, pp. 83, 104 and 111).

(ii) *Copula Carnalis*. (Sexual Intercourse).—A very great deal of learning has been expended in the discussion of the question whether the consummation of marriage, *copula carnalis*, is an essential of the married state, so that without it there is no true marriage. We do not propose to go into the history of these discussions, which are purely theoretical and, as we think, somewhat fruitless. The passages both in Genesis and in the New Testament clearly recognize the *copula* as the peculiar characteristic feature of marriage, and the early writers

appear to shew that on the whole the Church of the first five centuries regarded the copula as a necessary feature of marriage.[9]

According to the doctrine that prevailed for a while, there was no marriage until man and woman had become one flesh.[10]

Later, and especially in the teaching of the Schoolmen, the view was put forward, and very generally accepted, that the *copula* was not of the essence of marriage. As we have already seen, in Roman law consent, and consent alone, was necessary to constitute marriage, which of course could be similarly dissolved, and there can be no doubt that the theorists of the Church were greatly influenced by this doctrine of the system of law which the Church had so largely adopted. It is, however, of interest to notice some of the grounds on which some, and among the most eminent of these writers maintained that the *copula* was not of the essence of marriage. These appear to have been mainly three, viz.: (i) That there was no *copula* in Paradise although there was marriage. This was taught by S. Thomas Aquinas, who thought that the present method of human generation was due to the Fall. (ii) That the Blessed Virgin Mary is called " wife ", though her marriage to S. Joseph was never

[9] Watkins, *op. cit.* p. 117.

[10] Pollock and Maitland, *op. cit.* vol. ii, p. 368.

consummated. (iii) That the *copula* is too much encompassed about with shame to form an essential part of a holy ordinance. These views are much found in the literature of the Western Church throughout the Middle Ages. Many readers will agree with Mr. Watkins that the Western Church of the Middle Ages " has suffered greatly in its theology of marriage from the fact that its writers have been almost invariably celibates ".[11] When, however, it came to practice, reality and common sense prevailed over theory founded on false premises. As we shall see later, the Western Church came to teach the absolute indissolubility of marriage, *i.e.* of Christian marriage, but for that purpose she restricted the term to consummated marriage. The present teaching and practice of the Roman Church is that

> the consummation of the marriage is, however, required to give to the union the highest degree of firmness. No earthly power, not even that of the Church herself, can dissolve a consummated marriage between two baptized Christians.[12]

Where consummation is absent, the Church can, and constantly does, dissolve the union. Both the reason and nature of marriage, and, as we have seen, the teaching of Holy Scripture, involve the view that the *copula* is an essential element, and the constant practice of the Church is consonant only with the recognition of this truth.

B. NON-ESSENTIAL : *Formalities.*—As we have seen, the adoption by the Church of the maxim that consent, and consent alone, creates marriage, prevented her for many centuries from insisting, as a condition of validity, that marriage be publicly solemnized, although she enjoined public religious solemnities, often under pain of ecclesiastical penalties.

The result was the evil of clandestine marriages ; an evil which persisted in spite of every possible deterrent which was tried, probably the most important being the rule, for long adopted by the canon law, that a clandestine union was

[11] Watkins, *op. cit.* p. 122. Even Mr. Watkins regards the *copula* as *slightly* shameful ; see pp. 76, 122 of his book.

[12] Joyce, *op. cit.* pp. 39-40.

presumed to be illicit, though such presumption could be rebutted by evidence. According to Gratian the Court would not hold the presumption rebutted on the evidence of one party alone.[13]

The first departure from the teaching of the early Church appears in the East, at the end of the ninth century, when Leo the Philosopher (886–911) decreed that marriages contracted without the Church's blessing should be null and void. The teaching of the Eastern Church is thus summarized by Mr. Watkins :

> In the East it has for centuries been the prevalent doctrine that the formal solemnization before the Church is not less necessary than the mutual consent of the parties. That is, for example, the teaching of the Orthodox Confession of the Patriarch Peter Mogilas, of Kiev (A.D. 1640), which has been confirmed by various synods, and is admitted throughout the East to be of very high authority. This Confession lays down that there are three essentials for Christian marriage :
>
> (1) Suitable matter (ὕλη ἁρμόδιος), *i.e.* a man and woman whose marriage no impediment bars ;
> (2) A duly ordained priest or bishop (ὁ ἱερεύς, ὅπου νὰ εἶναι νομίμως κεχειροτονημένος ἢ ὁ ἐπίσκοπος) ;
> (3) The invocation of the Holy Ghost, and the solemnity of the formularies (ἡ ἐπίκλησις τοῦ ἁγίου πνεύματος καί τὸ εἶδος τῶν λογίων).
>
> The teaching of the Confession appears to be generally received. It is not, however, denied by learned Eastern writers that the formal solemnization and the presence of the priest were not in early ages always required.[14]

In the West no essential alteration was made until after the Reformation.[15] The Roman Catholic Church altered her law in 1563, in the decrees of the Council of Trent, while in

[13] Joyce, *op. cit.* p. 106. The whole history of this matter, together with the legislation of the Council of Trent and the later legislation of the Roman Catholic Church, is most fully given in Chapter III of this work.

[14] Watkins, *op. cit.* pp. 91-2.

[15] The Continental Reformers seem to have maintained that clandestine unions were null and void ; see Joyce, *op. cit.* pp. 115-16. This teaching, as appears from the text, was accepted neither by the Church of England nor by the Church of Scotland ; in that country the old law remained unchanged until 1939.

England the change was not made until 1754, by Lord Hardwicke's Act.

The decree Tametsi of the Council of Trent effected a radical change. In those parishes in which it was promulgated the old rule ceased to have effect, and thereafter no marriage was valid unless celebrated in the presence of three witnesses, one of whom must be either the parish priest of one of the parties, or a priest delegated by the Ordinary. The decree was not published in those countries which were predominantly Protestant, where the older law remained in force, and the bishop could dispense from publication of banns. The only important subsequent legislation is the Ne Temere Decree of 1908, which is embodied, with only minor alterations, in the Code of 1917. The Ne Temere dealt with mixed marriages, *i.e.* between a Roman Catholic and a non-Roman Catholic baptized Christian: such marriages, as well as those between Roman Catholics, must, to be valid, be celebrated before the parish priest of the district in which it takes place, or the Ordinary, or some priest delegated by one or other of these, and there must be two other witnesses. The doctrinal basis and justification of the Tridentine change is carefully examined by Father Joyce, in his work already quoted, at p. 178 *et seq.* It seems correct to say that the requirements are regarded as disciplinary or positive ecclesiastical requirements rather than as dogmatic definitions of the essentials of Christian marriage; otherwise it is difficult to understand either how dispensation can be granted, or how marriages between non-Roman Catholic Christians can be regarded, as undoubtedly they are in Roman theory, as valid Christian marriages.

In England after the Reformation the law remained the same in that marriages contracted *per verba de praesenti* or *per verba de futuro*, followed by *copulatio carnis*,[16] but without any religious ceremony, were valid marriages. An Act passed in 1540 (32 Hen. VIII, c. 38) did indeed provide that as from 1st July 1540 an unconsummated pre-contract should have no force against a marriage subsequently celebrated ecclesi-

[16] See *supra*, p. 72.

astically and consummated. This provision was, however, repealed by the Act 2 & 3 Edward VI, c. 23, and the old law restored.

Although clandestine marriages were valid, the Church of England continued, after the Reformation, to try to prevent them. The Canons of 1603 provide against a clergyman celebrating matrimony without banns,[17] and contain strict regulations as to the granting of licences dispensing from banns. Where a secret marriage was proved the Court ordered that it be duly celebrated in church, and default in obeying the order resulted in the defaulting party being excommunicated. Also the aid of the secular Court was invoked, and the culprit was imprisoned on a writ *de excommunicato capiendo* issuing from the Court of Chancery until he consented to obey the monition of the ecclesiastical judge. In 1754 a radical change was made by Parliament. Lord Hardwicke's Act (26 Geo. II, c. 33) invalidated all marriages unless celebrated in the parish church after due publication of banns; the archbishop having the right to grant a special licence for the marriage to take place elsewhere than in such church and without the delay of banns, and the bishop a right to grant a licence dispensing from the necessity of banns. This Act also invalidated the marriage of minors, *i.e.* persons under twenty-one, contracted without the consent of their parents or guardians. This last provision is no longer law, subsequent Acts requiring such consents under sanctions of a punitive and proprietary character, but leaving the marriage contracted without consent valid.[18]

It will be observed that the above change was brought about by Parliament, and might be considered as not in itself altering the law of the Church. But we have already pointed out that in those days the idea of Church and State as essentially different bodies, a commonplace of thought

[17] The first imposition of the publication of banns was in England, in 1200, when Archbishop Hubert Walter ordered that no marriage was to be celebrated until after a triple publication. In 1215, at the Lateran Council, the rule was extended to all Western Christendom. Pollock and Maitland, *op. cit.* vol. ii, p. 370.

[18] *I.e.* the absence of parental consent has ceased to be a diriment and become a prohibitive impediment.

now, did not exist. The State was a Christian State, Parliament, with its large representation of the clergy through the bishops, the Christian legislative authority of that State. In point of fact the measure was supported by the bishops, the objections to it coming from other and strange quarters. As Canon Lacey writes :

> Looking back dispassionately on the heated discussion, we may see here a last act of the unitary body politic in which Church and State were merged.[19]

In Scotland, as we have already noticed, the old law remained in force until 1939, when the Marriage (Scotland) Act, 1939 (2 & 3 Geo. VI, c. 34) abolished the validity of irregular marriages *de praesenti* or by promise *subsequenti copula*[20] contracted after the coming into operation of the Act, viz. 1st January 1940.

From the above we conclude :

(i) That the universal teaching has been that the free and mutual consent of the parties is an absolute essential of marriage, the absence of which is fatal to the existence of marriage.

(ii) That, roughly for the first thousand years, the teaching of the universal Church was that, given that no impediment to the marriage existed, the consent above mentioned was (subject to No. (iii) *infra*) the only requisite to a valid marriage.

(iii) In the West, that although consent, without consummation, was sufficient to constitute marriage, an unconsummated marriage was different in quality from a consummated marriage, in that the former could be, and constantly was, dissolved, whereas the latter no power on earth could dissolve.

(iv) That later — the different branches of the Church doing so at different times — the Church imposed on her members obligatory public religious ceremonies for the contracting of marriage, the absence of which resulted in the Church not recognizing the validity of the marriage.

[19] Canon Lacey, *Marriage in Church and State*, p. 192.
[20] See *supra*, p. 30, n. 13.

Although it is true that the chief reason which led to this great change was the desire to put an end to the mischief of clandestine marriages, it is to be observed that the Church felt justified in insisting, as a condition of recognizing them as valid, that marriages be solemnized by public religious ceremonies in church. It was not until much later, in 1836, that in England secular ceremonies before a registrar were allowed, though a concession had previously been made to Jews and Quakers, allowing them to be married according to the rites of their persuasions.

CHAPTER VII

THE TEACHING OF THE CHURCH (*concluded*)

Nullity and Divorce

NULLITY.—We have above tried briefly to state the teaching of the Church as to the persons competent to contract marriage, and the constitutive factors creating marriage between persons competent to contract. Those factors we divided into the essential, consent and the *copula*, and the non-essential, the formalities from time to time enjoined by the Church. We also saw that, as regards formalities, although strictly speaking these are non-essential in the sense that the Church for nearly a thousand years admitted as valid marriages contracted without them, yet for many centuries practically every branch of the Church has refused to recognize the validity of marriages informally contracted; her motive in so doing being chiefly to get rid of the evil of clandestine marriages.

The prescribed formalities, although in one sense non-essential, may rightly be regarded, certainly *in foro externo*, as one of the essential constitutive factors.

From the above premises it would logically follow that any union which does not satisfy these requisites is not a marriage, and that the fact that a man and woman live together in sexual intimacy for many years does not make it so.[1] Speaking very generally, this conclusion was accepted and acted upon by the Church. Obviously through the centuries the question, Is the union, apparently marriage, between A and B a valid marriage? was bound often to arise, and was one which the Church, in exercise of her discipline over her children, was called upon to answer.[2] When, after examining

[1] This is well brought out by Sir Harry Vaisey in his note on Nullity, Appendix No. V to the Report of the Joint Committees, p. 71.

[2] As explained in Chapter VIII, *infra*, p. 110, the secular Courts may sometimes have to answer this question.

all the relevant facts, the answer given was "No", the Church Courts pronounced a decree to this effect, *i.e.* judicially declared that A and B were not, and never had been, man and wife. This became known as a *divorce a vinculo matrimonii*. It was, as we have said above (p. 50), some time before the Church obtained exclusive jurisdiction in matrimonial causes; but she finally did so, and this jurisdiction involved the investigation of apparent marriages alleged to be invalid, and the granting of divorce *a vinculo* where they were held to be invalid. The principles applied became systematized into a highly developed and highly intricate part of the canon law of the Church.

In England, until 1857, all matrimonial causes were within the exclusive jurisdiction of the ecclesiastical Courts, and when, by the Matrimonial Causes Act, 1857, that jurisdiction was transferred to the Divorce Court, we have already seen that that Court was directed to decide all nullity cases, among others, on the principles theretofore applied by the ecclesiastical Courts. In 1937, as we shall see later, the Matrimonial Causes Act, 1937, created certain additional grounds on which a marriage may be avoided; but these are additional only, and the old grounds remain applicable. As already stated, in the Church of England the decisions of the Divorce Court in nullity suits are taken as declaring the law of the Church, although the judges of that Court are not canonists, and in practice the Church has always accepted a decree of nullity pronounced by the Divorce Court.[3]

The grounds on which the Divorce Court grants these decrees will be stated in Chapter VIII, on The Present Position under English Law. Here we will only say that, in our opinion, and if what has earlier been stated be accurate, these grounds, although with one possible exception [4] none of them is a ground which the Church as a whole does not regard as invalidating marriage, fail to include grounds which the Church has so regarded, and which the Church of

[3] We do not know whether this is so where the decree is based on one of the new statutory grounds.

[4] *I.e.* polygynous marriages in the case of converts; see *infra*, p. 98.

England, assuming she really does not now, might treat as invalidating marriage without disloyalty to her catholicity or to the general tradition of Christianity.

The law of the Roman Catholic Church is extremely intricate, and any attempt at a full exposition thereof would be not only beyond the scope of this book, but also of our ability. We shall, we think, be accurate in stating that, generally speaking, a marriage can be annulled on proof of the absence of any of those conditions, above enumerated, required for a valid marriage. To take them in order:

(i) Both parties must be Christians, *i.e.* baptized persons (*supra*, p. 54). Where this is not the case, the marriage can be dissolved. While both parties are unbaptized, the Church does not claim jurisdiction over them; but after the baptism of one, that party can, in certain circumstances, obtain a dissolution.

This is the case of the Pauline privilege,[5] and the grounds on which a dissolution can be granted are, shortly stated, those mentioned above (p. 55).[6] If both the parties become baptized, the marriage becomes indissoluble. This impediment, known as *disparatus cultus*, can be dispensed, and when this has been done, the marriage cannot be dissolved under the Pauline privilege.

This impediment is not a ground for nullity in England: there have been decisions upholding the marriage, where one party was not a Christian, although the impediment of *disparatus cultus* was not the ground relied on for its invalidity.[7]

(ii) Neither party must have a spouse living (*supra*, p. 57).

(iii) Both parties must be of requisite age (*supra*, p. 58). These do not call for special notice. Both impediments invalidate the marriage: we think that under the Roman Catholic law (iii) renders it voidable only, and that it can be dispensed. In England both impediments make the marriage

[5] Based on 1 Cor. vii, 12-16; see *supra*, p. 43, and *infra*, p. 96.

[6] See also Roman Code, Canons 1120 *et seq.*

[7] Chetti *v.* Chetti, 1909, P. 67; Brinkley *v.* Attorney General, 15 P.D. 76. See *supra*, p. 56.

absolutely void,[8] and no dispensation is possible.

(iv) Prohibited degrees. This again invalidates the marriage. In England, both by the law of the land as well as by the law of the Church, no dispensation is possible. In Roman Catholic law, as already stated, dispensation can be granted except for very near relationships; and this is true also of the other analogous impediments mentioned on pp. 62 and 63.

(v) Consent (*supra*, p. 69). This is, perhaps, the most difficult part of the Roman Catholic law to understand in view of the many refinements and distinctions to which its application has given rise. Also some very odd-seeming decisions have often raised suspicions in the minds of non-Roman Catholics that in effect dissolution under the guise of nullity is being granted. Whether or to what extent these suspicions are justified, we are not in a position fully to judge. As above stated, consent must be free, mutual, directed to marriage as understood by the Church, and intended to be immediately operative. The absence of any of these elements is a ground for obtaining a decree annulling the marriage. Sufficient has, we think, already been stated as to the kind of circumstance negativing these requirements.

(vi) *Copula carnalis* (*supra*, p. 73). Although in Roman Catholic theory this is not an essential element, an unconsummated marriage can be annulled. Where one of the parties to such has taken solemn monastic vows, involving that of complete chastity, the marriage is *ipso facto* dissolved. In other cases the Pope may dissolve the marriage for grave causes. Impotency or incapacity in one party at the time of the marriage is a diriment impediment, and gives the other party a right to a decree.

(vii) Formalities (*supra*, p. 74). The effect of defective formalities under English law will be considered later, in Chapter VIII.

The teaching of the Roman Catholic Church sufficiently appears from what is stated above (p. 76). Where the absence

[8] For explanation of difference between void and voidable marriages see *infra*, Chapter VIII, p. 110.

of the requisite formalities is proved, a decree dissolving the union can be granted. There are provisions by which a marriage, invalid because of a diriment impediment, may be revalidated. This may be either simple revalidation, *i.e.* the removal of or dispensation from the impediment, and the renewal of consent by both parties, or at least by the party who knew of the impediment; or what is called revalidation *in radice* (*sanatio in radice*), a method which is available without such renewal of consent. This is a highly technical matter: the relevant Canons are Nos. 1138 *et seq.*

Finally, the Roman Catholic Code contains strict rules as to who may institute proceedings for dissolution: these are the parties to the marriage, "*nisi ipsi fuerint impedimenti causa*". The meaning of this is not quite clear, but Dom Charles Augustus, commenting on it, writes:

> We believe the intention of the lawgiver was to restrict that cause to a malicious or sinful, or at least a deceitful action. In that case it would merely be an application of the well-known axiom that no one should be benefited by a fraudulent act committed by himself.[9]

Besides the parties to the marriage the prosecuting attorney of the diocesan Court may attack a marriage because of impediments which are by nature public. No other person may institute proceedings, but anyone may denounce a marriage to the Ordinary or prosecuting attorney, that he may take action should he think fit.

Only the parties themselves may petition for dispensation from a marriage ratified but not consummated. This probably includes petitions on the ground of impotence or incapacity. A marriage cannot be attacked after the death of either party.

As already appears, most of these grounds are also grounds for a decree of nullity in England. Those which are not are (i) and (vi), except where non-consummation is due to impotence or incapacity existing at the date of the marriage; in which case the marriage is voidable at the instance of the

[9] Augustine, *Commentary on the New Code of Canon Law*, p. 418.

other party.[10] As regards (v), consent, this is a ground in England, though to a more limited extent. The circumstances in which consent is defective and inoperative to constitute marriage have largely appeared above (p. 72); they will be further stated in Chapter VIII, on The Present Position under English Law, since the principles on which the English Court acts are, or must be taken to be, those of ecclesiastical law.

In Scotland the grounds of nullity are the same as existed in England immediately before the coming into operation of the Matrimonial Causes Act, 1937.

The grounds of nullity in the Orthodox Church are stated in a letter from His Grace the Metropolitan of Thyateira to the Bishop of Chichester, printed as Appendix II to the Report of the Joint Committees of the two Convocations on Church and Marriage. The grounds are:

I. In the public interest —
   (i) An already existing valid marriage.
   (ii) The existence of a valid third marriage, since fourth marriages are forbidden.
   (iii) Ordination and vows of celibacy, *i.e.* entering the monastic life.
   (iv) Prohibited degrees.
   (v) Absence of Episcopal licence.
   (vi) Incapacity for sexual relations, *i.e.* marriage contracted with a eunuch.[11]
II. In private interest —
   (i) Inability to exercise civil rights owing to insanity.
   (ii) Total absence of consent.
   (iii) Minority of age, *i.e.* not adult, not arrived at puberty, under age.
   (iv) In case of minors, absence of parental consent.

DIVORCE.—Divorce is a word with a number of different meanings. As we have seen, the judicial decision that an apparent marriage is not, and never has been a marriage,

[10] Since 1937 wilful refusal to consummate the marriage is a statutory ground of nullity; see *infra*, Chapter VIII, p. 113.

[11] Impotence from other causes is a ground of divorce; see *infra*, p. 90.

or rather the order of the Court embodying it, was known in ecclesiastical law as a divorce *a vinculo matrimonii*. That is its first meaning, and that kind of divorce, now known as a decree of nullity, we have already dealt with. In the ecclesiastical Courts of the West, including England until 1857, there was another kind, known as divorce *a mensa et thoro* (from bed and board). This in England is now called a decree of judicial separation, a term which expresses more accurately its nature and effect. It puts an end to the obligation of the spouses to live and cohabit together, but it leaves the marriage status unaffected, so that neither may re-marry: in case of reconciliation they can without further formality resume the marital life. The third meaning of the word is a dissolution of a valid marriage: this at the present day in England is the only sense in which the word is used, and by English law, as also was the case under Roman law, both parties are free to re-marry. As we have seen, the secular law affecting the members of the early Church, Roman law, allowed divorce freely, at the will of either party or by mutual consent; the only restriction on causeless divorce being by way of pecuniary penalties. To a Roman marriage was a contract requiring mutual consent not only for its creation but also for its continuance, and the average Roman would have thought any restriction of the right of the parties mutually to agree to end their marriage an intolerable piece of tyranny. It is probable that divorce by mutual consent was regarded as more seemly than one forced on an unwilling spouse. Also, as we have seen, a Roman husband whose wife committed adultery was practically compelled to divorce her.

The history of the Church's teaching on divorce, and whether marriage after divorce is permissible, is a long one, and shows very great divergence of views at different periods and in different branches of the Church. Speaking very generally, divorce with right of re-marriage was from an early date admitted in the East; gradually came to be forbidden in the West — quite definitely so from the time of Gratian, twelfth century; and at the Reformation was

admitted by Protestantism. The position of the Church of England differed from that of the Protestant Churches, as, after a certain amount of wavering, she stuck to the catholic teaching in respect of the indissolubility of marriage.

Divorce, in the second sense above mentioned, viz. judicial separation, has always been admitted as justified in certain cases, usually adultery and great cruelty. The different grounds on which it has from time to time been allowed by the Church will appear in what follows. The important and controversial matter is divorce dissolving the marriage status, and the right of re-marriage. The history of the Church's teaching on this is, as we have said, very long, and the reader who wishes to study it will find it treated very exhaustively and with great learning in Chapter VII of Mr. Watkin's book, from which we have already quoted extensively — a chapter of 287 pages. In what follows we will try to give a brief and, we hope, an accurate summary.

History of Church's Teaching

Taking as a first period that up to the conversion of Constantine, A.D. 314, the teaching of the Church appears to have been :

1. A husband may put away his wife for adultery, *πορνεία*.

2. Some authorities insist that a husband must put away a wife who continues in adultery.

3. A wife may, but is not bound to, put away a husband for adultery.

4. Adultery, *πορνεία*, means adultery, *i.e.* post-nuptial sin, and the ground does not include pre-nuptial unchastity. But some authorities include various forms of figurative adultery, chiefly idolatry.

5. No re-marriage is allowed after divorce. On this we cannot do better than quote Mr. Watkins : [12]

It is most significant that the testimony of the first three centuries affords no single instance of a writer who approves

[12] Watkins, *op. cit.* pp. 222 and 225.

re-marriage after divorce in any case during the lifetime of the separated partner, while there are repeated and most decided assertions of the principle that such marriages are unlawful.

Reviewing all the cases of re-marriage after divorce, we find that the writers and canons of the period which ends with Constantine's conversion do not approve of such re-marriage in *any* case, and that there is considerable expression of disapproval in *every* case. . . . If the voice of the earliest Church is to be heard, Christian marriage is altogether indissoluble.

6. A wife, put away for adultery, should be received back by her husband if and when she returns a penitent, and a penitent husband ought to be received back by his wife.

7. There is no instance during this period of any writer referring to Matt. xix, 9, as to an authority allowing re-marriage after divorce, or as to a difficult passage requiring to be explained away.

The second period is that from the conversion of Constantine to Justinian, A.D. 314 to 527. It was during this period that began the divergence between East and West. The reasons for this do not concern us, but in the East the Church had a more difficult struggle with the secular power, whereas in the West during the Dark Ages the Church alone remained the centre of civilization and therefore obtained greater political authority. Summarizing the teaching during this period:

1. Councils and authors alike admit that a husband may put away his wife for adultery, and there is general, but not unquestioned, agreement that he ought so to do. The conventional morality of the Empire, especially in the East, required a man to put away an adulterous wife.

2. A wife may, but need not (except according to S. Jerome), put away an adulterous husband. Conventional feeling in the East, and apparently also in Gaul, was strongly opposed to the exercise of the right.

3. Adultery does not, according to any authority, include pre-nuptial unchastity; but some writers extend it to cover various forms of spiritual fornication.

4. As regards re-marriage after divorce, the West is

practically unanimous in declining to admit it. In the East the teaching is uncertain, some writers allowing re-marriage, usually only to the innocent spouse.

Speaking generally, it may be said of the period under review, that it shows the Western Churches maintaining the entire indissolubility of the marriage tie except by death, while the Churches of the East, under the pressure of the secular law and of the conventional morality of the Eastern Christians, utter an uncertain sound.[13]

5. A husband was not allowed to continue living with his wife so long as she continued in adultery: in the East the common opinion was that a husband should not take his wife back on her repentance. S. Augustine took the opposite view on the question. Whether the guilty husband may or ought to be received by the wife was hardly a practical question. The guilty husband, penitent or not penitent, and whether or not he continued in adultery, was by the custom of the time permitted to continue his marital relations. The Christian writers condemn this custom, but do not deny the right of the wife to remain with her adulterous husband should she wish so to do.

6. Matt. xix, 9 is not cited by any writer as supporting the right of re-marriage after divorce for adultery.

It is during the period after Justinian that takes place the great and lasting divergence between the teaching of East and West. While content to suffer divorce for a variety of causes, the Eastern Church struggled hard to get rid of the law which allowed divorce by mutual consent. This was finally accomplished at the end of the ninth century, when divorce by consent was abolished, never again to be allowed. As regards divorce on specified grounds, the Eastern Church has, as from the time of Justinian, countenanced such with right of re-marriage. The present teaching of the Orthodox Church is stated in the letter from the Metropolitan of Thyateira referred to above (p. 85). From this it appears that the grounds, either defined by the Church or defined

[13] Watkins, *op. cit.* p. 344. Apparently Lactantius and Ambrosiaster allowed the innocent husband who had divorced his wife for adultery to re-marry.

by the State and accepted by the Church, are adultery, such acts as are conducive to adultery, viz. by the wife, deliberate abortion, going to banquets with strangers for an immoral purpose, without valid reason and without the husband's consent passing the night in a stranger's house, frequenting indecent places of amusement against the husband's wishes: and by the husband, prostituting the wife, publicly accusing her of adultery and being unable to substantiate the accusation, openly or secretly living with another woman with whom he has sexual relations either in the same or another house. Besides the above, other grounds are: apostasy of either spouse from the Christian faith, the consecration of the husband as bishop, in which case the consent of the wife is necessary, and her entry into a convent not situate in the same diocese is a condition required; the taking of monastic vows by either spouse, here too the consent of the other party is necessary.[14] The above are the grounds defined by the Church; those defined by the State and accepted by the Church are: high treason, disappearance of either party for a period of time fixed by the civil law, malicious desertion, and impotence continuing for three years.

The above grounds, wide as they seem, are apparently narrower than existed at the end of the last century, for Mr. Watkins, writing in 1895, mentions two others, viz. the reception by either party of his or her child from the baptismal font, a ground springing from the fiction of spiritual affinity; and pregnancy by a third person at the time of the marriage.[15] As these grounds are not mentioned by His Grace the Metropolitan, presumably they have now ceased to exist.

In the West the Church, from the time of Justinian, gradually obtained control of and exclusive jurisdiction over matrimonial matters: she had no highly organized secular

[14] This, in effect, seems more like separation by consent, as presumably no re-marriage is possible.

[15] Watkins, *op. cit.* pp. 358 and 355. Apparently under legislation of the Emperor Leo IV and Constantine VI between A.D. 776 and 780 collusion of the partners to effect spiritual relationship was severely punished. Canon Lacey, *op. cit.* p. 126, mentions existing pregnancy as a diriment impediment.

power with which to contend. This gradual gaining of control varied in tempo; it being in Italy itself that it was first accomplished, and only later in the other parts of Europe. In Italy itself the Church was able to, and did in fact, signally maintain the indissolubility of marriage. Mr. Watkins writes, of the Church in Italy:

> Summing up the traditions of the Roman Church for the second five centuries of Christianity, it may be said that they consistently maintained the early traditions of the indissolubility of Christian marriage with only one certainly discordant utterance; viz. the judgment of Gregory II in the case of supervening infirmity. The peculiar position of the episcopal courts as authorized tribunals, in a condition of affairs where all secular authority was in a state of flux, had the effect of making the strict tradition of the Roman Church the only admitted law of marriage in the Italian peninsula.[16]

In Europe outside Italy it was long before the Church succeeded in forcing on the people her views. This was largely due to the system of individual law; different races being governed by different codes. It is beyond our purpose to describe the history of Europe at this period: the result was that in many parts the system of law applicable to different peoples allowed divorce, often on the grounds allowed by the older — pre-Justinian — Roman law, and for a long time the Church had more or less to accept this. Finally, however, the Church succeeded in enforcing her strict views: this was finally accomplished, according to Mr. Watkins,[17] in the tenth and eleventh centuries.

To sum up, it may be said that from the time of Gratian the teaching of his Decretum, between A.D. 1139 and 1142, forbidding altogether marriage after divorce, was practically the teaching and the law of the whole Western Church until the question was again raised at the Reformation.

In the British Isles before the Norman Conquest there was, in varying degrees, considerable laxity. For instance the laws of Howel the Good, in so far as they represent the practice of the Welsh Church in the tenth century, "touch

[16] Watkins, *op. cit.* p. 380.

[17] Watkins, *op. cit.* p. 394.

the lowest point ever reached by Christian legislation in the matter of marriage".[18] Similar laxities are found elsewhere among the Celtic Churches. The most important of this time is the teaching of Theodore of Tarsus, the Greek Archbishop of Canterbury from A.D. 668 to 690. Clearly he was influenced by the Eastern teaching and practice, and in his Penitential he definitely admits re-marriage after divorce not only for adultery but on many other grounds, *e.g.* conviction for crime with sentence of servitude. In view of the teaching of Theodore of Tarsus, it is worth noticing that the Council of Hertford (A.D. 673, and so held during his archiepiscopate) condemned re-marriage after divorce.[19]

From the time of the Norman Conquest the English Church came into line with the Churches of Italy and the Continent, and the Continental canon law.

It may be said that from the time of the Norman Conquest there has never been any serious contention in England that the law of the English Church embodied any recognition of divorce *a vinculo*, properly so-called, or of remarriage after such divorce.[20]

At the time of the Reformation there was considerable diversity of opinion among English Churchmen, many being affected by much of the teaching of the Reformers of Germany and Switzerland. The collection of proposed canons known as the *Reformatio Legum Ecclesiasticarum*, intended to replace the ancient canon law of England, allowed divorce for a variety of reasons, with right of re-marriage to the innocent spouse only. Shortly stated the grounds were: adultery, desertion, continuous absence and deadly hostility.[21] The *Reformatio* never became law, nor was it acted upon. As to this it is, we think, worth quoting at length the conclusion of the late Sir Lewis Dibdin:

I think, therefore, the answer to the question whether the *Reformatio Legum* was acted on in matrimonial causes during the

[18] Watkins, *op. cit.* p. 423.

[19] Watkins, *op. cit.* p. 414. This is, we believe, the first conciliar pronouncement definitely forbidding re-marriage in all cases.

[20] Watkins, *op. cit.* p. 426.

[21] For fuller statement of provisions see Dibdin and Chadwyck Healey, *English Church Law and Divorce*, pp. 22-3.

latter half of the sixteenth century must be in the negative. I confess I should have supposed that a mere recital of the regulations and penalties laid down in the *Reformatio* with regard to this subject would be enough to convince anyone that it never was and never could have been a practical, working code. There is not so far as I know, either in judicial records or in history, any trace of its ever having been acted on. But further, I venture to think that the fair result of an examination of the materials collected in these pages is that the law of the Church of England as to the indissolubility of marriage and the corresponding practice of the Church courts, remained unchanged throughout the period under notice, that is, from before the Reformation until after the present canons of 1603–4 came into operation.[22]

The present law of the Church of England clearly does not sanction re-marriage after divorce. Canon 107 runs:

In all sentences pronounced only for divorce and separation *a thoro et mensa*, there shall be a caution and restraint inserted in the act of the said sentence, That the parties so separated shall live chastely and continently; neither shall they, during each other's life, contract matrimony with any other person. And, for the better observation of this last clause, the said sentence of divorce shall not be pronounced until the party or parties requiring the same have given good and sufficient caution and security into the court, that they will not any way break or transgress the said restraint or prohibition.

Also the whole structure of the Marriage Service in the Church's Book of Common Prayer is completely inconsistent with the view that the bond of marriage is dissoluble, with right of re-marriage, during the lives of the spouses.

This still represents the law of the Church of England, and though, in consequence of the large increase in the number of divorces, and re-marriages, the bishops and the Convocations have, at different times, passed various resolutions on the subject, these do not go further than to deal with the admission or non-admission to the sacraments and privileges of the Church of persons who have so re-married. The latest of these — of the Convocations — passed in 1936, reaffirmed the indissoluble character of marriage, and stated

[22] Dibdin and Chadwyck Healey, *op. cit.* p. 78.

that the Church should not allow the use of the Marriage Service to anyone re-marrying whose former partner is still living. It is, on the other hand, true to say that a certain number of Churchmen, of unquestionable ability and piety, both clerical and lay, have believed and do believe that Our Lord did make an exception in the case of a husband who divorces his wife for adultery; an exception which most of them extend, by analogy, to the innocent wife who divorces her husband on account of his adultery.[23] It is clear, however, that the law of the Church has not been so altered.

The Protestant Reformers of the Continent were divided, roughly, into two schools on the subject of marriage and divorce. Both repudiated the catholic teaching that marriage is a sacrament. Luther and his followers taught that marriage and its regulation were purely secular affairs, to be regulated by the State without interference from the Church. The law of Christ, he maintained, was for the conscience of the individual, not to be the necessary standard of secular law, and marriage law was wholly to be regulated by the State, marriage being the same for all, Christian and non-Christian. Luther's view was that divorce, with right of re-marriage, was allowed to Christians for adultery and long desertion with no prospect of return; but he did not hold that the State was bound to legislate in conformity with this view. The civil ruler was free to legislate as he thought best for the community.

Calvin and his school held very different views. They taught that marriage belonged to the civil order and remitted its judicial control to the State, but they left little scope for legislation. Marriage, though belonging to the civil order, was a sacred thing, if not technically a sacrament, and the State was bound to administer the law of marriage as revealed in Scripture. The judges must learn it from the theologians, and apply it faithfully. The Calvinists originally taught that

[23] Dr. Charles Gore, *The Sermon on the Mount*, 1908, pp. 71 and 215. Dr. Gore takes the view that Our Lord in Matt. xix makes a real exception to the prohibition of re-marriage after divorce, in favour of the innocent husband. At the same time Dr. Gore recognizes that the Church of England does not take that view, but maintains the absolute indissolubility of marriage.

divorce was allowable for adultery only, basing this on the texts from S. Matthew's Gospel. Later, on the strength of an argument derived from the Pauline privilege, they added malicious desertion as a ground. In both cases, they asserted, the marriage tie was loosed, not by the decree of the Court, but by the fact; the tribunal's function being merely to ascertain the facts and give them forensic publicity. Desertion was a ground only where its obstinacy made reconciliation impossible, and adultery on the man's part only where aggravated by other circumstances, making it intolerable to any wife.

Scotland adopted practically *in toto* the Calvinist teaching. Divorce for adultery was not established by any statute, but after the adoption of the reformed religion, on 24th August 1560, the Courts held it to be the law of the land. Divorce for desertion was instituted by an Act of 1573 — the necessary period being four years. A departure from the teaching of Calvin is that the adultery alone of the husband gives the wife the right of divorce; also, except for the prohibition contained in the Act of 1600, prohibiting the marriage of the adulterous divorced wife to her paramour (see above, p. 62), both parties may re-marry. In old days Scots law punished adultery as a crime; in very old days with death.

From a Statement on Marriage and Divorce in Scotland, by the Rev. A. P. Sym, D.D., printed as Appendix III to the Report of the Joint Committees of the English Convocations, it appears that, by the law of the Church of Scotland, a person who has obtained a divorce on the ground of the desertion or adultery of his or her spouse, is entitled to be married in his or her parish church; but that the spouse who has been divorced for adultery, apart from the statutory prohibition of marriage to the guilty wife's paramour, has no such right. Nothing in this Statement deals specifically with the case of a spouse divorced on account of desertion, but we gather that this is the kind of question which the Church of Scotland, through her courts, *i.e.* the Kirk Session or the Presbytery, would determine on merits in each particular case.

The Divorce (Scotland) Act, 1938 (1 & 2 Geo. VI, c. 50), has altered the law of Scotland by extending the grounds of divorce. The period of desertion is made three years instead of four, and additional grounds are: incurable insanity, such cruelty as would have justified a decree of separation *a mensa et thoro*, and sodomy and bestiality. There is also a section entitling the Court, where there is reasonable ground for supposing one party to be dead, on a petition by the other party, to grant a decree dissolving the marriage on the ground of presumed death. This section is almost identical with section 8 of the Matrimonial Causes Act, 1937, which applies only to England, and which is set out *infra* (Chapter VIII, p. 115).

We do not know whether the Church of Scotland has yet decided what attitude to adopt in the case of divorce on one of these additional grounds.

Mixed Marriages, the Re-marriage of Converts, and Marriages of the Heathen

No account of the teaching of the Church would be complete without referring to her teaching on the subject of the Pauline privilege and the re-marriage of converts. The passage giving rise to the Pauline privilege is contained in 1 Cor. vii, 12-16:

> But to the rest say I, not the Lord: If any brother hath an unbelieving wife, and she is content to dwell with him, let him not leave her. And the woman which hath an unbelieving husband, and he is content to dwell with her, let her not leave her husband. For the unbelieving husband is sanctified in the wife, and the unbelieving wife is sanctified in the brother: else were your children unclean; but now are they holy. Yet if the unbelieving departeth, let him depart: the brother or the sister is not under bondage in such cases: but God hath called us in peace. For how knowest thou, O wife, whether thou shalt save thy husband? or how knowest thou, O husband, whether thou shalt save thy wife?

We have seen that S. Paul, in 2 Cor. vii, 14 *et seq.*, strongly condemns mixed marriages, *i.e.* marriages between baptized

Christians and unbaptized persons, and that the Church, after a short period of uncertainty, condemned them, refusing to recognize their validity. Apparently the principle of the nullity of such marriages was established not so much by the canons as by the customary law of the Church.[24] In view of the fact that the Pope claims the power to dispense from this impediment, it seems impossible to say that the Roman Catholic view is that such a marriage is in its essential nature invalid: it must be that the impediment belongs to positive ecclesiastical regulation. As already stated, mixed marriages in England are valid.

As regards converts, different considerations of course applied. The Church seems to have taught that the marriages of the heathen were essentially and *prima facie* valid and indissoluble in the sense that they ought not be dissolved, except for some really grave cause. One grave cause is stated by S. Paul, and became known as the Pauline privilege. We have above (p. 55) quoted the passage in which Mr. Watkins summarizes the teaching of the Church, from which it appears that the married convert could divorce his unbelieving (*i.e.* unbaptized) spouse, with the right of re-marriage, (i) if the unbeliever refuse to abide, (ii) will not abide without contumely to the Creator, (iii) will not abide without soliciting the Christian partner to the commission of mortal sin. In the East the mere refusal to be converted was sufficient ground.

In the West the application of this principle was the occasion of much debate and learning. Speaking very generally, the views of the unbaptized partner had to be ascertained as to whether he or she were willing to abide as above stated, and the convert was not free to re-marry until this, called the *interpellatio*, had been carried out. Further, it came to be generally taught, and accepted by the Roman Catholic Church, that what dissolves the marriage is not the refusal peaceably to abide — that only gives the right — but the actual Christian marriage of the convert. Not even the re-marriage of the unbeliever, if the convert has not re-

[24] Watkins, *op. cit.* p. 575, quoting Benedict XIV, A.D. 1749.

married, dissolves the marriage. Where, therefore, the unbeliever and his second wife became converted, it was held that the first marriage subsisted and the husband bound to return to his first wife, the original convert.[25]

It is clear that difficulties arose even where the converts were from a people practising monogamy. It must be remembered, too, that the early Church obtained her converts practically exclusively from peoples practising monogamy, though with frequent divorce and re-marriage. Difficult questions arose where the convert had, before conversion, been several times divorced and re-married, and still more difficult ones after Christianity began to be preached to polygynous races. The latter case almost certainly never arose for decision by S. Paul or any of the Apostles. As regards the former, the teaching of the Church generally was that the first marriage was valid, and the convert must return to the first spouse: this was, of course, subject to the Pauline privilege, if applicable. As regards polygynous marriage, *i.e.* where the convert had, before conversion, married several wives, the Church took the step of presuming that his first marriage, and that alone, was valid. But in this case the husband was, apparently, only bound to retain his first wife if she were willing to be converted and become a Christian.[26] If she refused, then he was at liberty to take any of his other wives who became Christians: in this case, however, he would have to go through a proper ceremony of marriage with her.[27] We confess that the above rule, which certainly appears to be that adopted by the Church, seems to us difficult to defend on any logical basis. If an essential of marriage be, as the Church has always taught, the consent of the parties to an exclusive union, the presumption that a man, a member of a race practising polygyny, when he contracts marriage with his first wife, intends his union with her to be exclusive or monogamous, seems directly contrary to all probability. It is further the case that this presumption

[25] The case of Abraham and Ricca, in the eighteenth century; see Watkins, *op. cit.* pp. 565-6; Joyce, *op. cit.* pp. 479-80. Apparently even so the Pope did, in fact, dissolve the first marriage.

[26] Joyce, *op. cit.* p. 572.

[27] See Kirk, *Marriage and Divorce*, p. 25.

which the Church made was capable of being rebutted by satisfactory evidence that such an union was not, in fact, intended; and the fact that, at the time of conversion, the man could not remember which was his first wife, if established, was enough to rebut the presumption, and resulted in none of his marriages being regarded as valid. We should have thought that it merely showed a very bad memory.

The question has not, as far as we know, ever been directly raised in the English Courts, but the case of Hyde *v.* Hyde & Woodmansee [28] seems, by necessary implication, to cover it; and in the case supposed, to result in none of the man's marriages being valid. In that case the petitioner was an Englishman by birth, and presumably, though it is not so stated in the report, had been baptized. At the age of about sixteen years he had become a Mormon, while living in London. He became acquainted, in London, with the respondent, then Miss Hawkins, who with all her family were Mormons, and she and the petitioner became engaged. In 1850 Miss Hawkins and her family went to Salt Lake City, Utah, and in 1853 the petitioner, who by then had become a Mormon priest, joined them there. The marriage between the petitioner and respondent took place in Salt Lake City, being celebrated by Brigham Young, the President of the Mormons, and the governor of the territory, according to the rites and ceremonies of the Mormons, and they lived together as man and wife. At the time polygyny was part of the Mormon doctrine, and was the common custom in Utah. The petitioner never, in fact, took another wife, and later he renounced the Mormon faith, left Utah — finally resumed his English domicil — and wrote to his wife urging her to renounce Mormonism and join him. She refused to do either. He was excommunicated in Utah, and his wife declared free to re-marry, which she later did, to the co-respondent. The petitioner sought a divorce on the ground of his wife's adultery with the co-respondent. Lord Penzance, in an exhaustive judgment well worth perusal, held that the marriage was invalid, on the ground that it was not one as

[28] 1866, L.R. 1 P. & D. p. 130.

understood in Christendom, namely "the voluntary union for life of one man and one woman, to the exclusion of all others", and therefore dismissed the petition, as there was nothing to dissolve. The *ratio decidendi* (legal ground of the decision) seems clearly applicable to the case of a marriage of a member of an African polygynous tribe to his first of several wives. Again in the case of Harvey, otherwise Farnie *v.* Farnie,[29] a case which decided that the English Court would recognize as valid a decree of a Scottish Court dissolving the marriage of a domiciled Scotsman and an Englishwoman though the marriage was solemnized in England, and the marriage was dissolved upon a ground for which by English law no divorce could have been granted, Lord Justice Lush, in the course of his judgment, said:

> Marriage in the contemplation of every Christian community is the union of one man and one woman to the exclusion of all others. No such provision is made, no such relation is created in a country where polygamy is allowed, and if one of the numerous wives of a Mohammedan were to come to this country, and marry in this country, she could not be indicted for bigamy, because our laws do not recognize a marriage solemnized in that country, a union falsely called marriage, as a marriage to be recognized in our Christian country.

These observations, though *obiter*, or not strictly necessary to the actual decision, are entitled to great weight.

It seems clear that, apart from the Pauline privilege, in the Roman Church the Pope claims to, and does, dissolve the marriages of unbaptized persons under circumstances regarded as proper. This appears to date from the sixteenth century, the need arising from the circumstances prevailing in the missionary fields opened up after the discovery of America. This is fully explained by Fr. Joyce in his book, already cited.[30] The theology of these dispensations certainly justifies our earlier statement that the Church, at any rate of the West, does not attribute to the marriage of the unbaptized indissolubility in any other sense than that it ought not be dissolved except for grave cause.

[29] 1880, 6 P.D. 35.

[30] Joyce, *op. cit.* p. 490 *et seq.*

As already appears, the law of the Church of England does not, where the union is contracted in a country and by persons recognizing polygyny, treat it as a marriage at all. To consummated Christian marriages on the other hand, as has been seen, the Church in the West, except the Protestants but including the Church of England, attributes indissolubility in the sense that it is impossible to dissolve them.

CHAPTER VIII

THE PRESENT POSITION UNDER ENGLISH LAW [1]

As we have already seen, the law of marriage in England is based upon the law of the Church, and although Parliament has in more recent times legislated so as to make lawful marriages which are contrary to the law of the Church, the broad principles of the law are those developed by the Church. Also we have seen that the Matrimonial Causes Act, 1857 provided that in all suits other than for the dissolution of marriage the Court should apply those principles theretofore applied by the ecclesiastical Courts; and such suits include suits for declarations of nullity.

In order to constitute a valid marriage, the parties must be able to contract, willing to contract, and must actually contract in the proper forms and solemnities required by the law to be observed in the mode which they have chosen to adopt.

Ability to Contract

Each party must be of the requisite age, which is now sixteen years for each sex, and if either party be under that age, the marriage is a nullity. Neither party must have a spouse living. Although a person who goes through a ceremony of marriage in the reasonable and honest belief that his former spouse is dead, or if he has not seen or heard of such spouse for seven years or more, will not be guilty of the felony of bigamy if the former spouse be in fact alive, the second ceremony will be absolutely void as a marriage, and the party not previously married as free to contract marriage with another as if the ceremony had never taken place. A valid decree dissolving a marriage results in neither

[1] What follows takes no account of the emergency regulations made by the Clergy (National Emergency Precautions) Regulations, 1939, made under the Measure of that title and year. These, being only temporary, we have ignored.

party having a spouse living. If either party be under the age of twenty-one years, not being a widow or widower, the consent of the parents or guardians is necessary, but a marriage which takes place without such consent is perfectly valid.[2]

Under this head the parties must not be within the prohibited degrees, and any purported marriage between persons within those degrees is absolutely void. These degrees are those in the Table of 1563, subject to the provisions of three fairly recent statutes, viz. The Deceased Wife's Sister's Marriage Act, 1907 (7 Ed. VII, c. 47), The Deceased Brother's Widow's Marriage Act, 1921 (11 & 12 Geo. V, c. 24) and The Marriage (Prohibited Degrees of Relationship) Act, 1931 (21 & 22 Geo V, c. 31). The effect of these statutes is that a man may now marry —

> his deceased wife's sister; his deceased brother's wife; his deceased wife's brother's daughter; his deceased wife's sister's daughter; his father's deceased brother's widow; his mother's deceased brother's widow; his deceased wife's father's sister; his deceased wife's mother's sister; his brother's deceased son's widow; his sister's deceased son's widow.

In the case of the re-marriage of divorced persons, it is provided that it is not lawful for a man to contract any marriage which upon the decease of any person would be authorized by these Acts, but which would otherwise have been void by reason of affinity, during the lifetime of that person; so, *e.g.* after the dissolution of a marriage between A (man) and B (woman), B could not marry A's brother so long as A were alive. Also no clergyman of the Church of England is compellable to perform the marriage, but he may allow his church to be used if another clergyman, entitled to officiate in the diocese, is willing to perform the ceremony. Subject to the above, the Table of 1563 still governs. The impediment of consanguinity covers illegitimate as well as

[2] Thus the absence of consent is a prohibitive, not a diriment impediment. See *supra*, p. 67.

legitimate relationship,[3] that of affinity does not.[4]

Ability to contract obviously includes mental capacity, and no person is able to contract marriage who is insane, or so intoxicated as not to understand what he is doing. A lunatic so found, *i.e.* by inquisition, cannot contract a valid marriage even during a lucid interval: [5] in the case of a lunatic not so found the Court will, on the question being raised, have to consider the question of fact whether he was capable, at the time of the ceremony, of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject, and its duties and responsibilities.[6] The same question would arise in the case of intoxication.

Willingness to Contract

The parties must be willing to contract marriage: the maxim "*nuptias non concubitus sed consensus facit*" (consent, not cohabitation makes a marriage), which was, as we have seen, adopted from the Roman into the canon law, is also part of the law of England.

The above maxim means two things: first, that the parties must be free agents, so that a marriage ceremony in which one party is constrained through fear or duress is a nullity. Such cases are of course rare, and always difficult to prove, but they have occurred, and the legal principle applicable seems clear:

> The Courts of law have always refused to recognize as binding contracts to which the consent of either party has been obtained by fraud or duress, and the validity of a contract of marriage may be tested and determined in precisely the same manner as that of any other contract. . . . Whenever from natural weakness of intellect or from fear — whether reasonably entertained or not — either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent

[3] R. *v.* Inhabitants of St. Giles in the Fields (1847), 11 Q.B. 173.
[4] Wing *v.* Taylor (1861), 2 Sw. & Tr. 278.
[5] Marriage of Lunatics Act, 1811 (51 Geo. III, c. 37). Turner *v.* Meyer, 1 Hagg. Cons. 414.
[6] Jackson *v.* Jackson, 1908, P. 308.

than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger.[7]

Secondly, the maxim means that the parties must intend to get married, and the Courts have pronounced decrees of nullity on being satisfied that the petitioners intended and thought they were going through ceremonies of betrothal.[8] They must also intend to marry one another, so a marriage to one woman believing her to be another would be void. Further, the intention as well as the effect must be to contract what the law regards as marriage, which has been stated to be " the voluntary union for life of one man and one woman, to the exclusion of all others ".[9] The question cannot probably arise in respect of marriages contracted in England. It has been held that a foreigner or British subject domiciled abroad who enters into a contract of marriage with an English woman in England — a marriage which would be recognized by the law of England as valid if contracted between persons domiciled in this country — does not carry with him any disability of a personal character imposed by the law of his domicil so as to preclude him from contracting a valid marriage with her in this country; also that a person who by Mohammedan law is permitted to have four wives cannot, on the ground that English law only recognizes a monogamous marriage, set up the illegality of the marriage contracted here.[10] However, the question can and has arisen in cases of marriages contracted abroad in countries where polygyny is lawful. In the case of Hyde *v.* Hyde & Woodmansee, L.R. 1 P. & D. 130, and also in that of *In re* Bethell, 38 Ch.D. 220, the Court held the so-called marriages void, the first because it was contracted between Mormons in Utah, whose law allowed polygyny, the second because it was between an Englishman

[7] Per Butt, J. in Scott *v.* Sebright, (1886) 12 P.D. at pp. 23, 24.

[8] Ford *v.* Stier, 1896, P. 1. Kelly *v.* Kelly, (1932) 49 T.L.R. 99. In the former case the Court found also that the petitioner was to such an extent under the influence of her mother and the respondent (the alleged husband) that she was not a free agent.

[9] Per Lord Penzance in Hyde *v.* Hyde & Woodmansee, L.R. 1 P. & D. at p. 133.

[10] The King *v.* The Superintendent Registrar of Marriages, Hammersmith, 1917, 1 K.B. 634.

and a woman of a savage tribe in Bechuanaland, contracted according to the custom of the tribe which allowed polygyny. It has been held that a marriage does not the less satisfy the above definition because by the law of the country where it is contracted it can be dissolved by mutual consent or at the will of either party, with merely formal conditions of official registration.[11]

It may perhaps be here explained that, according to the rule of private international law, the forms and ceremonies prescribed by the law of the place where the marriage takes place, the *lex loci*, must be satisfied, subject to the proviso that the law of the place must understand by "marriage" marriage as above defined ; and further, in the case of British subjects, to the Foreign Marriages Act, 1892, which authorizes formalities alternative to those of the *lex loci*.

The test of the validity of a marriage as regards essentials (in contradistinction to formalities and ceremonies) is the *lex domicilii*. This question usually arises owing to different countries having different prohibited degrees. The general rule is that the law of the domicil determines the matter, so that in some cases marriages have been held valid which if contracted by domiciled English people would be invalid, and in other cases vice versa. It seems probable that this rule is subject to the proviso that the English Courts will not recognize a marriage stamped as incestuous by the general consent of Christendom ; — *In re* Bozelli's Settlement, 1902, 1 Ch. 751 — but the Court did not define what marriages would be so stamped ; presumably any in the direct line of ascendant and descendant, and brother and sister.

Formalities

To constitute a valid marriage the parties must solemnize their union in one or other of the forms allowed by law. These are as follows :

1. By special licence. A special licence can be issued only by the Archbishop of Canterbury, and it may authorize

[11] Nachimson *v.* Nachimson, 1930, P. 217 (marriage in Russia).

marriage anywhere and at any time, by a clergyman of the Church of England according to the rites and ceremonies of that Church.

2. By common licence. This is granted by the bishop or his surrogate. One party must personally swear before the surrogate that he believes there exists no impediment to the marriage, and that one of the parties has, for the space of fifteen days immediately preceding the licence, had his or her usual place of abode within the parish or chapelry in which the marriage is to be solemnized; and where either of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the persons whose consent is required, has been obtained.

3. By publication of banns. To procure publication of banns the parties, or one of them, must give seven days' previous notice in writing to the clergyman of the parish or parishes in which they reside, with their names and residences, together with the consents of those persons, if any, whose consent is necessary. The banns must be published by being read aloud during the morning service, or if there be no morning service, during the evening service, in the parish church, or if the parties live in different parishes, in the parish churches, on three Sundays before the solemnization of the marriage.[12] The names of the parties must be correctly given, and should be the known and acknowledged names, *i.e.* those by which the parties may be presumed to be known by their friends and relatives. Where the banns are wilfully published in a false name to the knowledge of both parties, the marriage is void.[13] Where the parties live in different parishes, the marriage may not be solemnized by the incumbent of either parish without a certificate of banns thrice asked from the incumbent of the other parish.

In both the above cases, common licence and banns, the marriage must be solemnized within three months of the grant of the licence or the complete publication of banns,

[12] Not necessarily three successive Sundays, nor the same Sundays in each parish.

[13] Chipchase *v.* Chipchase, 1942, P. 37. A marriage by licence is probably not invalidated on this ground; see *infra*, p. 112.

by a clergyman of the Church of England according to the rites and ceremonies of that Church, and between the hours of 8 A.M. and 6 P.M. in the presence of two witnesses. In the case of a licence it must be in the church named in the licence; in the case of banns in one of the churches in which they have been published. Where the parties wish to be married in a church, not of their parish, but which is the " usual place of worship " of one or both, they can now do so, either by banns or licence, under the provisions of the Marriage Measure, 1930. In the case of banns, they must be published in the " usual place of worship " as well as in the parish church, and where a licence is sought the oath is that the church is the " usual place of worship " within the meaning of the Measure. No church or chapel is to be deemed to be the usual place of worship of any person unless he is enrolled on the church electoral roll, and where such church is of a parish in which he does not dwell, such enrolment is sufficient evidence that it is his usual place of worship.

As already appears, the above three forms are applicable only where the marriage is to be celebrated in the church, or according to the rites thereof, by a clergyman [14] of the Church. Where the parties do not wish to be so married, they can be married either in the church of some other denomination or by the registrar in the register office. In such a case they must obtain a certificate of the Superintendent Registrar; this can be either with or without licence.

4. Certificate without licence. To obtain this, one of the parties must give the prescribed notice to the Superintendent Registrar of the district within which the parties have dwelt for not less than seven days — if in different districts to the registrar of each — containing the full and correct names, addresses and descriptions of each, the time they have resided in the district, and the church or building within the district where they are to be married. The notice is kept by the registrar, and a copy entered in a book, which is open for inspection by anyone. The party giving notice must sign a

[14] See *infra*, p. 112.

solemn declaration that he knows of no impediment, and that the parties have resided, as stated, for seven days, and, in the case of minority, that the requisite consents have been obtained, as in the case of a common licence. A copy of the notice is exhibited for twenty-one days before the certificate issues, and during that time any person entitled may forbid its issue by writing the word "Forbidden" opposite the entry, and signing his name, together with his address and the character in which he interferes. At any time within three months of the issue of the certificate the marriage may be solemnized, either in a church of England named in the certificate and according to the rites of the Church, or in the register office without religious ceremony, or in a registered building named in the certificate with such religious ceremony as the parties may choose. The marriage in all cases must take place between 8 A.M. and 6 P.M., and before two witnesses. It is optional for a clergyman of the Church of England to refuse to accept a certificate in lieu of banns.

5. Certificate with licence. The procedure is very much the same as in the case of a certificate without licence. The following are the principal differences: the party applying must declare that either he or the other party has dwelt in the district for at least fifteen days prior to the granting of the licence. If the parties live in different districts, notice need be given only to the registrar of one. The notice need not be exhibited. The licence and certificate can be granted after the expiration of one day. The registrar may not grant a licence for marriage in any church or chapel of the Church of England. The licence expires with the certificate, three months after its issue.

Special legislation exists in respect of marriage of British subjects abroad. A marriage solemnized abroad in which both or one of the parties is a British subject may be celebrated either according to the formalities set out in the Act, or according to the requirements of the law of the country in which it is solemnized. A marriage may also be celebrated on board one of His Majesty's ships on a foreign station, and within the British lines of a British army serving

abroad. A marriage on a British merchant ship, even without a clergyman, if one be not on board, is, seemingly, valid: an entry of any marriage on such ship must be made in the log.

Nullity of Marriage

The question whether a particular union, ostensibly a marriage, is in law such may arise for determination in more than one way. The parties, or one of them, may learn something about the law which makes them or him suspicious that the marriage is void, and, possibly glad of a way out of an unhappy union, one party applies by petition to the Court for a decree declaring the so-called marriage a nullity. Sometimes, however, the question arises in quite a different way, *e.g.* where a testator has left a bequest to "the children of A", and A clearly has children, but the marriage of A to their mother may be of questionable validity; a question which must be determined in order to know whether the bequest takes effect in favour of A's children. This explains, for the layman, the apparently odd fact that the question of the validity and invalidity of marriages has so often been determined by the Chancery Division rather than by the Divorce Division of the High Court. We have already noticed the provision of the Matrimonial Causes Act, 1857, requiring nullity of marriage to be determined according to the principles applied theretofore by the ecclesiastical Courts, and that the decisions may therefore be taken to be in accordance with the law of the Church of England.

In law a marriage may be void *ab initio*, or only voidable. The distinction is of very great importance: a marriage void *ab initio* is void from the beginning, and does not need any judicial decision or decree to make it so, though one is, of course, usually sought with the object of recording the fact in a way which can never be questioned. Such a supposed marriage may be questioned by any person having a financial interest, *e.g.* in the hypothetical case above stated, the persons entitled under the will in default of A having children. On the other hand, where a marriage is voidable

only, it can be set aside or avoided only during the lifetime of the parties and at the instance of one of them; and although the decree of nullity is retrospective in effect and declares that there never has been a marriage, "transactions which have been concluded, things which have been done, during the period of the supposed marriage, cannot be undone or reopened after the marriage has been declared null and void".[15] The distinction between void and voidable marriages can perhaps be most forcibly illustrated thus: on an indictment charging A with bigamy in going through a ceremony of marriage with X, his wife B being then alive, it would be a defence for A to prove any fact which would in law make his marriage to B void; it would not be a defence for A to prove any fact rendering his marriage to B voidable, and in the latter case he would be guilty of bigamy, and his marriage to X a nullity.

Many of the matters which make a supposed marriage void have already appeared in what we have written of the essentials of marriage. Briefly they may thus be summarized:

1. Want of age: if either party be under the age of sixteen years, the marriage is void.

2. An already existing marriage: if either party has already contracted a valid marriage subsisting at the date of the solemnization of the supposed second marriage. This would be so, even though facts might exist which enabled criminal liability for bigamy to be escaped, and also even though the real spouse died the next day.

3. Prohibited degrees. If the parties be within the prohibited degrees, the marriage is void. As has already been stated, this has been the law only since 1835; before then such marriages were voidable only. Prohibited degrees means the Table of 1563, as altered by the three statutes mentioned above (p. 103).

4. Lack of consent. A decree of nullity may be obtained on the ground that there was, in fact, no consent to the marriage. Fraud or duress invalidate the marriage only

[15] Dodsworth *v.* Dale, 1936, 2 K.B. 503, per Lawrence, J. at p. 512. See also *Re* Eaves, 1940, Ch. 109.

where they result in the absence of consent: fraud which merely induces consent, assuming the consent to be real, does not invalidate the marriage. "But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent.[16]

Where impersonation has been practised, so that a man goes through a ceremony of marriage with one woman, believing her to be another, there is no true consent. The test always applied is whether the threats or fraud practised were such as to preclude true consent. See also above under "Ability to contract" and "Willingness to contract".

5. Defective formalities. This as a rule renders the marriage void, but this rule is subject to certain exceptions and restrictions. Publication of banns in false names invalidates the marriage only where done wilfully to the knowledge of both parties; the use of false names in a licence does not, seemingly, invalidate the marriage. Also, although a marriage in the Church of England must be performed by a person in holy orders, the honest and reasonable belief of the parties that the officiating parson is in holy orders, if in fact he turn out not to be, would probably prevent the marriage being invalidated. Further, although the Marriage Act, 1823 requires the presence of two witnesses, the section is directory only, and a marriage in the presence of one only has been held valid. Once a marriage has been celebrated, no evidence may be given as to the fact of the required residence.[17] Finally we should mention that, where a marriage appears to be of doubtful validity, it can be validated by provisional order under the Provisional Order Act, 1905 and the Marriages Validity (Provisional Orders) Act, 1924.[18]

[16] Per Sir F. H. Jeune, President, in Moss *v.* Moss, 1897, P. 263, at pp. 268-9.

[17] Marriage Act, 1823, s. 26. Thus lack of proper residence may be considered a prohibitive impediment; see *supra*, p. 103, n. 2.

[18] Compare provisions of Roman Catholic Code on re-validation; *supra*, Chapter VII, p. 84.

The grounds on which a marriage is voidable rest partly on the law of the Church, partly on the Matrimonial Causes Act, 1937, which has added certain grounds additional to the old ones. As we have said, a voidable marriage subsists until set aside by a decree of the Court, and such decree can be pronounced only during the lifetime of both parties and at the instance of one of them. The old ecclesiastical ground is impotence or incapacity to consummate the marriage. This had to be existing at the time of the marriage, not subsequently supervening. The impotence or incapacity may be due either to physical or psychological causes, and may be either absolute or relative, *i.e.* subsisting between the particular man and woman only. Wilful refusal to consummate, not due to impotence or incapacity, was not, by the old law, a ground for a decree. As presently appears, it has now been made one. In the vast majority of cases the decree is asked for by the party who is not impotent or incapable, but in certain cases, as when that party has by conduct repudiated the marriage, a decree may be granted at the instance of the impotent or incapable party.[19] The Matrimonial Causes Act, 1937, section 7, has created other grounds on which a marriage is voidable, additional to the above. These are:

1. That the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage.

2. That either party to the marriage was at the time of the marriage of unsound mind or a mental defective within the meaning of the Mental Deficiency Acts, 1913 to 1927, or subject to recurrent fits of insanity or epilepsy.

3. That the respondent was at the time of the marriage suffering from venereal disease in a communicable form.

4. That the respondent was at the time of the marriage pregnant by some person other than the petitioner.

When the petition is based on any of the last three grounds, the Court may not grant a decree unless satisfied —

[19] Davies *v.* Davies, 1935, P. 58.

(*a*) That the petitioner was at the time of the marriage ignorant of the facts alleged.

(*b*) That proceedings were instituted within a year from the date of the marriage.

(*c*) That marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree. These last three matters are cumulative. There is also a provision legitimating any child born of a marriage avoided on either of the grounds (2) and (3) above.

Divorce

The dissolution of a valid marriage by a decree of a judicial authority, commonly known as divorce, is in England the creature of statute law; the first statute being the Matrimonial Causes Act, 1857. Although this statement is strictly accurate, marriages were sometimes dissolved, with right of re-marriage, by private Act of Parliament. This practice arose somewhere about the last half of the seventeenth century, but the number of such private Acts was not large, partly no doubt because of the expense they involved; first in bringing the necessary action against the lover of the guilty wife, and then in promoting the necessary private Bill. These Acts could be obtained only by the husband on the ground of his wife's adultery, and had to be preceded by an action at law, successfully prosecuted to judgment, by the husband against the wife's lover. This action was in trespass for criminal conversation, and the husband was awarded pecuniary damages against the lover. He could then proceed to promote the Bill of Divorce. Under this system a wife could not divorce a husband, either for his adultery or on any other ground.

We do not propose to give any details of the history of the legislation gradually extending the grounds of divorce: they can be found in many excellent text-books. Our present purpose will be served by stating what, as the law now stands, are the grounds of divorce. First it must be noticed that no

petition for divorce may be presented until three years have elapsed since the date of the marriage, subject however to the proviso that, upon application, a judge may allow a petition to be presented earlier on the ground that "the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent".

This restriction is quite new, having been first introduced by the Matrimonial Causes Act, 1937. The grounds on which a divorce can be obtained are set out in two sections of the 1937 Act, sections 2 and 8. The former are:

1. Adultery of the respondent since the marriage.

2. Desertion of the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition.

3. Cruel treatment of the petitioner by the respondent since the marriage.

4. That the respondent is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. There are certain detailed provisions defining the meaning of being "under care and treatment", with which we are not concerned.

5. In a petition by the wife, that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

Section 8 provides an entirely new ground, and of a different nature to the others. It will best appear by giving the terms of that section:

8.—(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.

(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that

time, shall be evidence that he or she is dead until the contrary is proved.

The section is a curious one: the decree the Court may make is twofold: first it presumes the death of the absent party, which one might have thought would make the petitioner a presumed widow (or widower), and then it dissolves the marriage which it has just presumed dissolved by death.

The legislature has struggled valiantly to ensure that divorce shall be really only a remedy for an injured spouse, and not an easy method of divorce by consent. The law provides that the Court shall pronounce a decree only if satisfied, first, that the facts on which the petition is founded have been proved; and secondly, that there is neither collusion nor condonation, or where the ground is adultery, connivance on the part of the petitioner. Where the Court is so satisfied on the evidence, it must pronounce a decree;[20] where it is not so satisfied, it must refuse a decree and dismiss the petition. So, in legal parlance, collusion, condonation and connivance are spoken of as absolute bars.

In addition there are certain other bars to a decree known as discretionary bars, *i.e.* where certain facts exist, the Court must decide for itself in each particular case whether to grant or to refuse a decree. Briefly they may be tabulated thus:

1. Whatever the ground of the petition, adultery, unreasonable delay in presenting the petition, or cruelty on the part of the petitioner.

2. Where the ground of the petition is adultery or cruelty, desertion or wilful separation before the adultery or cruelty complained of, on the part of the petitioner.

3. Where the ground of the petition is adultery, unsoundness of mind or desertion; wilful neglect or misconduct conducing to the matters complained of, on the part of the petitioner.

In all the above cases the Court may grant or refuse a decree; it has an absolute and unfettered discretion.

[20] Section 8 (2), *supra*, enacts that the Court "*may* make a decree", so the remedy appears to be discretionary in this case.

As regards re-marriage in Church of persons who have either obtained a divorce or been divorced, the law was altered in 1937, and is now contained in section 12 of the Matrimonial Causes Act, 1937, which reads as follows:

> No clergyman of the Church of England or of the Church in Wales shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on any ground and whose former husband or wife is still living or to permit the marriage of any such person to be solemnized in the Church or Chapel of which he is the minister.

This provision appears to us to be supremely important: it is not only a full recognition by Parliament of the right of the Church to decide for herself on the question of re-marriage after divorce, but it also recognizes that Parliament legislates independently of, and possibly contrary to, the law of the Church. The question has not, as far as we know, ever arisen, but presumably a clergyman of the Church of England could not refuse to re-marry — strictly it would not be re-marriage — a person whose former marriage had been annulled on one of the grounds stated in section 7 of the Matrimonial Causes Act, 1937.

It will be noticed that we have not mentioned judicial separation; but as we said earlier, the matter is not one which affects the questions with which this book is concerned, as a decree does not dissolve the marriage, but merely suspends the marital obligations of the spouses. It is granted on any of the grounds on which a divorce might be granted, and some others, and it has certain other consequences of a proprietary nature which do not concern us.

CHAPTER IX

SUMMARY OF THE PRESENT POSITION AND SOME SUGGESTIONS

THE problem of what should be the teaching and practice of the Church of England in regard to marriage, particularly in cases of divorce and re-marriage, is a pressing one, to which the authorities seem fully alive. Not only has a great deal been written within the last few years, but also the Convocations of Canterbury and York, in 1931 and 1932 respectively, appointed Joint Committees to consider the matter. The terms of reference were, from the Convocation of Canterbury:

To consider the bearing of Resolution 11 of the Lambeth Conference of 1930 upon the practice of the Church in this Province, and to confer with any similar Committee appointed by the Convocation of York:

those from the Convocation of York:

To consider the bearing of Resolution No. 11 of the Lambeth Conference of 1930 upon the practice of the Church (in certain matters connected with Holy Matrimony) in the Province, and to confer with any similar Committee appointed by the Convocation of Canterbury: and further, to consider whether, in view of the present situation, a Commission should be appointed to review the law of marriage as it at present exists and the Christian principles relating thereto.

In view of the above terms of reference, it will be convenient to set out the Resolution of the Lambeth Conference therein referred to; it is as follows:

The Conference believes that it is with this ideal in view that the Church must deal with questions of divorce and with whatever threatens the security of women and the stability of the home. Mindful of Our Lord's words, "What therefore God hath joined together, let no man put asunder", it reaffirms "as Our Lord's principle and standard of marriage, a lifelong and indissoluble union, for better, for worse, of one man with one woman, to the

exclusion of all others on either side, and calls on all Christian people to maintain and bear witness to this standard ".[1]

In cases of divorce —

(*a*) The Conference, while passing no judgment on the practice of regional or national Churches within our Communion, recommends that the marriage of one whose former partner is still living should not be celebrated according to the rites of the Church.*

(*b*) Where an innocent person has re-married under civil sanction and desires to receive Holy Communion, it recommends that the case should be referred for consideration to the bishop, subject to provincial regulations.

(*c*) Finally, it would call attention to the Church's unceasing responsibility for the spiritual welfare of all her members who have come short of her standard in this as in any other respect, and to the fact that the Church's aim, individually and socially, is reconciliation to God and redemption from sin. It therefore urges all bishops and clergy to keep this aim before them.

The Joint Committees thus appointed published their Report in 1935 : this we have already referred to, and further references will be made. In 1936 some comments and criticisms, in the form of a Memorandum on the Report, were published on behalf of the Council of the English Church Union. In 1940 the Palmer Commission published its exhaustive Report on Kindred and Affinity as impediments to marriage, containing important recommendations now being considered by Joint Committees of the two Convocations. A few years before this, in 1933, the present Bishop of Oxford, Dr. Kirk, published a short, but highly important work on *Marriage and Divorce*. A still earlier book, published in 1912, is Canon Lacey's *Marriage in Church and State*. Thus the Church, both through her individual members, as through her formal bodies, is alive to the fact of the problem. The " present situation " referred to in the terms of reference from the Convocation of York is not, however, a stable one. The Introductory chapter in the Report (pp. 1 to 4) is to a large extent out of date owing to

[1] Lambeth Conference, 1920, Resolution 67.

the drastic alteration of the law of the land made in 1937, by the Matrimonial Causes Act of that year, the provisions of which we explained shortly in Chapter VIII.

Before proceeding to state the lines along which we suggest, in all humility, that the Church should frame her teaching and practice, it will be useful, indeed essential, to summarize the present position in England today with regard to marriage and divorce.

Summary of Present Position in England

1. MARRIAGE.—The law we have already explained in Chapter VIII, and it is that, as regards marriages contracted in England, the only requisites are that the parties should be of sufficient age and mental capacity, free agents, not already married, and not within the prohibited degrees; and further that they should conform to one of the requisite methods of public solemnization of their marriage, which includes certain requirements as to residence. Marriage may be celebrated in a church or chapel of the religious denomination of the parties, but it need not be, and may be celebrated in a purely secular manner, before the registrar. It is not irrelevant to notice that in marriages before the registrar the form of words prescribed does not, as does the Church of England Service, contain any reference to a life-long union. The words are prescribed by section 20 of the Marriage Act, 1836, and are as follows: " I call upon these Persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded Wife (or Husband) ". Thus the marriage is not expressed to be " till death us do part ", nor, in view of the known law of divorce, is it reasonably to be implied from the words " *lawful* wedded wife ". As regards duration, the words involve that duration only which the law of the State requires.[2] The State obviously exists for the benefit of all its members, whether they be Christians or not, and the religion of the parties to a marriage is there-

[2] This is not necessarily either England or Scotland. Where the husband has a foreign domicil, it is the law of his domicil.

fore irrelevant. As we have seen, the marriage of a Mohammedan or a Hindu contracted in England is perfectly valid, though he may be only temporarily resident here, and by the law of his domicil free to marry a plurality of wives.

As regards marriages contracted abroad, we have explained the test to which they must conform; also the fact that by the relevant law they can be dissolved at will does not affect their validity.

As regards validity, except as altered by specific legislation, the grounds of nullity are, theoretically, those accounted such by the ecclesiastical Courts before 1857. We have also stated the effect of section 7 of the Matrimonial Causes Act, 1937, in providing additional grounds on which a marriage is voidable. It is interesting to notice that these are all grounds suggested by the Joint Committees in their Report as " consistent with principle and free from objection ".[3]

2. DIVORCE.—When, however, we come to divorce, we find a very great divergence between law and fact. The theory of the law is that divorce is a remedy for the injured spouse and that collusion, condonation and connivance are absolute bars to the obtaining of a decree. Divorce by consent or agreement between the parties is, that is to say, absolutely forbidden. In point of fact, however, an enormous number of divorces are purely by consent, and everyone knows quite well that this is so. This involves no reflection whatever on the administration of the law, either by the judges, the legal profession or the King's Proctor. The law gives to one spouse the right to a divorce on account, among other things, of adultery or desertion by the other spouse: assuming that a couple have decided that their married life had better be terminated, it is perfectly simple for the husband to leave his wife, spend a night or week-end with some woman in circumstances leading to the inference of adultery, and then for the wife to present her petition. So long as the parties are fairly discreet as to the arrangement, it is practically impossible to prove the collusion. We doubt whether,

[3] Report, p. 11. The new statutory grounds were unanimously recommended by the Royal Commission of 1912.

in the present state of public opinion, a friend to whom they had spoken who gave evidence to the King's Proctor with a view to his intervening, would be regarded as a public-spirited protector either of the law or of the sanctity of marriage: we have little doubt that ninety-nine per cent of his friends and acquaintances would look on him as a horrid cad. The provision of desertion as a ground was intended to do away with this, but we doubt whether the only result will not be, in many cases, to substitute fictitious desertion for fictitious adultery; for those, that is, who prefer not to appear as adulterers and who don't mind waiting three years.

Such collusive divorce involves, on the part of the parties, criminal guilt; perjury by the petitioner, to which the respondent is almost certainly an accessory before the fact and therefore equally guilty; also they are probably both guilty of a conspiracy to defeat the ends of justice. It is, however, a fact that a large number of people, not only those who regard indiscriminate indulgence of sex as an allowable pastime, but people of ordinary respectability, regard the law as, in this respect, wholly unreasonable.

There is in many quarters a revolt against any view of marriage which emphasizes its social aspects and obligations, and an increasing tendency to regard it as a purely individual affair. There is also a growing impatience on the part of those who hold no allegiance to the Christian Church of the so-called or alleged predominance of the ecclesiastical influence in the marriage law, and there is a tendency to regard marriage as a purely human and civil contract which ought not to be allowed to remain binding when its terms have become unwelcome.[4]

We do not think that it is altogether true that this kind of attitude is restricted to those who "hold no allegiance to the Christian Church", if that mean those who consciously call themselves agnostics or atheists. We feel sure that there are many, especially among the more educated classes, who still have a sort of muddled idea that to be an English gentleman involves being a member of the Church; who have been baptized, confirmed and almost certainly married

[4] Report, p. 3.

in Church, which they perhaps attend at Christmas, Easter, Harvest Thanksgiving and the days appointed by the King as days of national prayer. They know little of Christian dogma, and care less; dogma to them is a lot of old-fashioned nonsense invented by monks and celibates in the Middle Ages, and having no relevance to modern life. They would no more regard themselves as bad Churchmen because they disagree with the Church's teaching, and act accordingly, than as bad Englishmen because they abuse the Government. A large number, probably the majority, are excellent husbands and wives; even if the men do occasionally stray from strict conjugal fidelity, they do so circumspectly and without causing distress or breaking up the home. Of the catholic [5] doctrine of holy matrimony they know but little; that marriage is in its nature indissoluble they regard as the teaching of Rome only, given up at the Reformation, though some will know that certain High Churchmen who would be better in Rome had tried to restore it.

It must be admitted that this ignorance is largely due to the failure of the Church of England to maintain anything like unanimous witness to her doctrine as established by her formularies. It may be that in quite recent years the type above described is dying out: the necessary connexion between being an English gentleman and an English Churchman is becoming an old-fashioned idea; [6] but we are confident that among the over-fifties it is still prevalent. Possibly the extension of the grounds of divorce — by the Matrimonial Causes Act, 1937 — beyond anything which can possibly claim the authority of Scripture, may bring home to these people that the law of the land is now incompatible, and deliberately incompatible, with the law of Christianity.[7]

[5] We use this word as including the Church of England. Where we refer to matters peculiar to Rome, we call them Roman or Roman Catholic.

[6] On February 16th, 1944, in answer to a question in the House of Commons relating to the apparent prevalence of Anglicans over other denominations among prisoners, Mr. Peake, Under Secretary of State for the Home Department, said, "I admit that it seems to be the general idea that there is something rather respectable or patriotic about declaring that one belongs to the Church of England." Official Report, vol. 397, col. 185.

[7] See *infra*, p. 131, and passage, there given, from speech of Lord Cecil.

To sum up, the present position in England appears to be: marriage is open to all, so long as they satisfy the above-mentioned requirements, whatever their race or creed. It is monogamous while it lasts, but is dissoluble by consent. It is the same for all in respect of its rights, duties and obligations, and any domiciled English husband, or the wife of any domiciled English husband, may obtain a divorce from the Court, whether they be Anglican, Roman Catholic, Non-conformist, Jew, Hindu, Mohammedan, agnostic or atheist, and irrespective of which of the permissible ceremonies for solemnizing marriage they may have used. It is almost certainly true that the great majority of English men and women approve of the provisions of the law as to divorce and of the fact that divorce by consent is possible.[8]

3. TEACHING AND PRACTICE OF THE CHURCH OF ENGLAND. —We will now, for a moment, consider what guidance, either to her loyal children, her nominal members or to the country generally, the Church of England gives and has given on this important question. As regards persons competent to contract marriage, we have seen that the marriage between a Christian and an unbaptized person is not only strongly reprobated by S. Paul, but in the teaching of the Church throughout the ages has been held to be invalid and void. The Report of the Archbishops' Commission on Christian Doctrine (*supra*, Chapter IV, p. 47) necessarily implies that it does not confer that grace which Christian marriage brings. We doubt, however, whether the impediment of *disparatus cultus* (difference of religion)[9] is known, even to the majority of the clergy, let alone to the laity. We have given reasons for the view that according to the law of the Church of England, or what, unfortunately, must now be taken to be her law, this impediment has ceased to exist; also the historical explanation of this regrettable fact. It should be pointed out that the Marriage Service in the

[8] See *infra*, p. 137, and passages, there given, from speeches of Archbishop of Canterbury and Lord Roche.

[9] This must not be confused with the present Roman Catholic impediment of mixed religion, where one party is a Roman Catholic and the other a Christian of another denomination; see *supra*, p. 67.

Book of Common Prayer — until 1836 the only service for all except Jews and Quakers — clearly envisages that both parties are not only Christians but confirmed members of the Church. The Rubric at the end of the Service, " It is convenient that the new-married persons should receive the Holy Communion at the time of their Marriage, or at the first opportunity after their Marriage ", taken in conjunction with that at the end of the Order of Confirmation, can hardly admit of any other explanation.[10] We do not think that, in practice, evidence either of baptism or of confirmation is commonly required. In this connexion it must be remembered that the very common practice of people being married in churches other than their parish church or their " usual place of worship ", means that constantly the priest solemnizing the marriage has neither seen nor heard of the parties until only a few weeks before the wedding. Apart altogether from marriages in church, the Church of England treats as valid register office marriages. Shortly stated, the Church of England accepts as the test of competence of the parties the test required by the law of the land, and nothing more.

Again, the impediment of *ligamen*, or existing marriage, has been applied in an uncertain and hesitating way. If we be right in saying that the doctrine of the Church of England is that marriage is indissoluble, the existence of a former marriage, even though it has been dissolved by a divorce, creates the impediment. Yet in a number of churches the so-called innocent husband or wife who has divorced her or his partner for adultery, has had a second marriage solemnized. Indeed until 1937 it was illegal for a parish priest to refuse to do so. In a few cases the re-marriage of the guilty partner has been solemnized. We believe that in the last few years the practice has been tightened up in the sense of refusing to solemnize such re-marriages in church; also since 1937 the law of the land has recognized the rights of the Church in this respect.

Equally uncertain is the teaching and practice of the

[10] Presumably it would suffice if they were " ready and desirous to be confirmed ".

Church as to the impediment of affinity, in respect of marriage to a deceased wife's sister and the other affines to whom, by the law of the land, a man may now get married.[11]

As regards formalities, we have seen that the old law which recognized the validity of clandestine marriages, remained unaltered until 1754. From the passing of Lord Hardwicke's Act until 1836, all marriages, except those of Jews and Quakers, had to be celebrated in church. As a result of the Marriage Act, 1836, secular marriage, in a register office, became lawful, and the Church of England seems to have accepted this and to treat all marriages, however and wherever celebrated, which are valid by the law of the land, as valid by her law.

Again, as regards intention, we have endeavoured to state the requirements of the law of the Church, and the requirements of the law of the land. As we have seen, the law of the land is that developed by the ecclesiastical Courts until 1857, and by the Divorce Court since that date; and here again the decisions of this latter Court have been, we might say of necessity, accepted by the Church.

It is now almost unquestionably the law that, given that the marriage has been duly contracted according to the required forms, the fact that the parties have agreed to some private arrangement, inconsistent with marriage, is irrelevant and no ground for a decree of nullity. The law presumes, irrebuttably, that the parties intended the legal consequences of their act. This does not apply, of course, to cases of compulsion or fraud, where true consent is non-existent, or one party believed the ceremony to be only betrothal, not marriage.

This presumption is reasonable and necessary for the State to make, but it must be remembered that that which the parties are presumed, by the State, to intend, is not a lifelong and indissoluble union; it is not, in a register office marriage, expressed to be so; but is, as we have seen, a union for life, defeasible during life on the happening of one or other of certain specified events, and in truth and

[11] We may expect that important revision will soon be made; *supra*, p. 66.

in fact defeasible by consent. It seems, therefore, that the Church, accepting the same test as that of the State, must accept as marriage a union which by the law governing it is expressly dissoluble by consent.[12] If there be any truth in the doctrine contained in the first resolution passed by the Convocations in 1935, affirming "as Our Lord's principle and standard of marriage a lifelong and indissoluble union for better or for worse of one man with one woman, to the exclusion of all others on either side", it is quite impossible to justify the presumption made by the Church of England — a presumption incapable of being rebutted in any proceeding, secular or ecclesiastical — that every marriage considered valid by the law of England is *in intention* a valid Christian marriage.

It might be said that, although the above is true of marriages in register offices, it cannot hold good of marriages contracted in church, where the parties expressly take each other for life. As to this there are two important matters to be remembered. First, not only do those Protestant denominations in Britain, such as the Established Church of Scotland and the Nonconformists, believe and teach that divorce with right of re-marriage in certain cases is in accordance with Christ's teaching, but this belief is also considerably held, and taught, in the Church of England. Taking the case, *e.g.*, of a marriage in the Church of Scotland, where the words generally used[13] are very similar to those in the Book of Common Prayer, those words must, we submit, be construed in the light of the surrounding circumstances known to both parties and witnesses; that is a well-established rule of construction. One of these circumstances is the known teaching of the Church of Scotland on divorce and re-marriage. So construed, we submit that the words cannot be taken to mean more than this, "I, A. B., take thee, C. D., etc. . . . till death us do part, Provided always that should you in the future commit adultery or maliciously desert me, I shall be entitled to divorce you and re-marry".

[12] Nachimson *v.* Nachimson, 1930, P. 217; see *supra*, Chapter VIII, p. 106.
[13] Report of Joint Committees, p. 61; statement by the Rev. A. P. Sym, D.D.

In the case of Church of England people who held the view that divorce for adultery and re-marriage was allowable to the innocent partner, the proviso would merely omit the words " or maliciously desert me ". It is of course true that the great majority of bridegrooms and brides do not at the time contemplate possible divorce ; they optimistically hope and expect that their marriage will be the happiest ever known ; but the point we are on is not what in fact the majority intend, but whether the principle — assuming it to be applicable, with which we deal later — that persons must be irrebuttably presumed to intend what they say, justifies their words being construed as involving a lifelong union incapable of dissolution on any ground. For the above reasons we submit that this presumption involves an interpretation of the words used in conflict with well-established and sound principles of construction.

Secondly, we very much doubt whether the application to marriage of the so-called rule of irrebuttable presumption is justified by catholic teaching or tradition. The rule in question is really a rule of evidence, based on convenience and intended to prevent injustice. It may be thus stated : where a person has, by words or conduct, represented to another that a particular state of facts exists, which in truth does not exist, and that other has, in reliance on the truth of that representation, incurred liabilities or any way altered his position, the person making the representation is not, as against the other party, allowed to deny its truth. The rule is a very good one, preventing injustice, but it does not further involve that the facts falsely represented exist in fact. The teaching of the Church is, as we understand it, that the validity of a sacrament depends on the right intention of its minister ; this means the *de facto* intention, not an intention only deemed to exist by virtue of a rule of evidence preventing him from proving his real intention. We do not mean that no presumption can properly be made ; obviously it is reasonable to presume that people mean what they say, but that the presumption should be rebuttable, not irrebuttable. Thus where parties to a marriage had contracted

with words which, on their true construction, involved a lifelong and indissoluble union, they should be presumed to have so intended *unless and until the contrary were proved.* This modified rule would be, we believe, in accordance with the general trend of catholic doctrine.

From the above it will be seen that, in our view, the present position is highly unsatisfactory; nor do we think that we are alone in that opinion. There is now, among the younger men and women of this country, an earnest seeking for some principle to guide their lives, which they can hope will really enable order and decency to emerge from the present chaos of evil. Dogmatic religion will not, we feel sure, turn these young people away from the Church which proclaims it: on the contrary they will listen to it carefully, having come to distrust the power of mere human endeavour to build a new order. The relevance of catholic Christianity to the world's economic needs the Church today fully realizes and proclaims. But as regards marriage, the very corner-stone of human society, the position is, as above appears, a vast muddle.

This muddle has arisen, we think, from the developments of, roughly, the last hundred years, which have seen the attempt to reconcile the irreconcilable. Before the Reformation England, along with the rest of Europe, was Christian, and her marriage law was that of the Church, administered by the Church's Courts. At the Reformation the Protestant churches repudiated, almost *in toto*, the catholic conception of marriage, possibly the most important aspect of this being as to its indissolubility. The Church of England took a course of her own. The law of marriage was largely altered, by the restriction of the range of prohibited degrees, and the abolition of the power of dispensing from the impediment of consanguinity and affinity. In essentials, however, and especially in respect of indissolubility, after a good deal of wavering, she retained the old law, and marriage remained within the exclusive jurisdiction of the ecclesiastical Courts. As we have seen, she also ceased to teach that marriage is a sacrament, restricting that word to the two sacraments of

the Gospel, but taught that it is an holy estate, and she still taught that it is created solely by the consent of the parties; the old universal teaching.

So long as the conception of Church and State as one, the spiritual and temporal aspects of the same society, corresponded fairly nearly to fact, the system worked. During the last century, however, there occurred great changes which resulted in this conception wholly ceasing to correspond to fact. The nineteenth century also witnessed an increasing realization that the Church of England is truly part of the Church Catholic, and of its continuity with the whole of Western Christendom: this led to an increased emphasis on the catholic life and teaching, and more definitely catholic doctrine and practice. The repeal of the Test and Corporation Acts involved an acknowledgment that Church and State were no longer one, and Parliament ceased to be the temporal representative of both Church and State, and became that of the State alone, Churchmen and non-Churchmen, Christians and non-Christians. The law of marriage, however, remained the same; not indeed without alteration, but the same law for all, whatever their religious views.

The then law pressed hardly on those who, not members of the Church, were by now regarded as entitled to equal treatment at the hands of the State. The remedies were gradual and piecemeal, largely, we think, because the fact that Church and State had ceased to be one was very slow in being appreciated; indeed we doubt whether it is as yet fully realized. In 1836, as we have seen, marriage in church ceased to be compulsory, and in 1857 divorce was introduced, and marriage ceased to be indissoluble. The Church's attitude was a compromise. As already stated, the Protestant denominations believed and taught that marriage is dissoluble, for adultery, and many add for malicious desertion too, the innocent party being entitled to re-marry. It is very arguable, though contrary to catholic teaching, that there is scriptural authority for the former view, and it was largely so held by Anglican divines, both at the time of the Reformation and later, though it had never become accepted as part of the

formal doctrine of the Church of England. The Act of 1857 allowed divorce, with right of re-marriage, for adultery — on the part of the husband only if aggravated by other offences — and contained a provision entitling a parish priest to refuse to solemnize the re-marriage of the guilty party only. The two facts mentioned, that divorce for adultery with right of re-marriage appears to be able to claim scriptural authority, and the teaching to that effect by some Anglicans, not unnaturally led to the belief that the State's law of marriage was still the same, or very nearly the same, as that of the Church. This was entirely deceptive: the law of the Church did not change; Canon 107 was still, and always remained the Church's law, binding on the clergy; yet after 1857 a parish priest was bound, as the result of an Act of a Parliament representing a people of every and no religious views, to solemnize the re-marriage of, *e.g.*, a husband who had divorced his wife because of her adultery. Section 12 of the Matrimonial Causes Act, 1937, which removes any duty on a clergyman to re-marry either party while the other spouse is alive, is an equitable and proper provision, but it is also a formal recognition that the theory of the unity of Church and State is definitely abandoned. The widely extended grounds for divorce will, we think, emphasize this. We are confirmed in the above views by Viscount Cecil of Chelwood, who in the course of the debate on the third reading of the Bill (now the Act) in the House of Lords, said:

> I am convinced that the people of this country believe, rightly or wrongly, that the provision with regard to divorce made in 1857 was in accordance with the Christian rule of marriage. I cannot bring myself to doubt that this cannot possibly be said of the present Bill.[14]

We suggest that, apart from legislation, the above influences have had an effect, probably not consciously realized, on the development of the case law, especially since 1857. We feel reasonably sure that the development of political and religious equality for all, together with the conception

[14] Official Report, vol. 106, col. 574.

of one law for all, influenced the trend of decisions, some of which are mentioned in Chapters V to VIII, on the requirements of marriage and intention. It is, of course, only speculation, but we cannot help thinking that cases like Chetti *v.* Chetti and Nachimson *v.* Nachimson[15] would not have been so decided, say at the end of the eighteenth century. The trouble really began, we think, when through inanition, so to speak, the impediment of *disparatus cultus* disappeared. As we have already explained, this case law must be deemed to be the law of the Church, a position which has, as it were, saddled her with a law not of her own making, or even made by canonists, in many respects directly contrary to catholic tradition and teaching never formally repudiated by the Church.

We have, therefore, arrived at a position where Parliament legislates on marriage as, in its wisdom, it thinks best for the community as a whole; doing so, rightly in our opinion, without necessary reference to the doctrinal views of the Church of England, or of any religious body. Also it seems clear that the corresponding right of the Church of England is now recognized by Parliament, and we are led to hope and believe that the lamentable exhibition given by the House of Commons in 1927, over the revision of the Prayer Book, will never be repeated. We venture to suggest, therefore, that the time has come, and is now propitious, for a thorough revision by the Church of England of her law, teaching and practice in regard to marriage. It goes without saying that any such legislation would bind only her members, and neither could nor would purport to alter the law of the land.

Suggestions for Alteration of Church's Law

The Report of the Joint Committees contains certain recommendations with which nearly all Churchmen will, we think, heartily agree: viz. as regards nullity, preparation for marriage and the Table of Affinity. The chapter on

[15] *Supra*, pp. 82 and 106.

admission to Holy Communion raises more controversial questions, and the comments thereon published on behalf of the Council of the Church Union contain some very forceful criticisms. Our own view of the Report is that it does not go nearly far enough, and that even though all its recommendations were carried out, the Church's law would still remain, in some important matters, the unsatisfactory hybrid we have tried to describe. The suggestions we venture to make fall under different heads, as follows:

1. PERSONS COMPETENT TO CONTRACT MARRIAGE: *Disparatus Cultus*.—We will not repeat what we have already written on this (*supra*, p. 124, and also in Chapter V). All we need here say is that the invalidity of a marriage between a Christian and an unbaptized person is consistently taught by the universal Church from very early times, and that such marriages are strongly reprobated by S. Paul. The loss or abandonment of the impediment in England seems to have been an accident, due to the question having so seldom, if ever, arisen; though, as we have shown, the Marriage Service of the Prayer Book necessarily assumes that both parties are Christians, and the Report of the Archbishops' Commission on Doctrine limits the grace conferred by marriage to marriage between Christians.[16] We suggest that the Church of England restore the impediment, and not only refuse to solemnize any such marriage, but refuse to recognize its validity; at the same time solemnly warning her children that such a union contracted by them, though lawful by secular law, involves mortal sin, being from the Christian standpoint merely legalized concubinage. It would of necessity follow that if a Churchman did contract such a marriage, and it were afterwards dissolved by a divorce, it would not create the impediment of *ligamen* (bond of existing marriage) to a subsequent Christian marriage.

Apart from the authority which such a rule would derive from Scripture and from the tradition of the universal Church, it is surely eminently reasonable. The importance of marriage, both to the parties themselves, to the children who may be

[16] See *supra*, Chapter IV, p. 47.

born of it, and to Church and State, can hardly be exaggerated. Its difficulties are also great, and probably no calling, more than marriage, requires for its successful fulfilment the aid of Divine grace. Also the marriage of a Christian to a non-Christian cannot result in that complete mental and spiritual unity which is so vital: there is bound to be a psychological tension from the fact that one partner is precluded from sharing in the spiritual life of the other.

Mixed Religion.—The question of marriage between Anglicans and baptized members of other Christian denominations is a very different, and not at all an easy question. It does not seem possible, consistently with catholic tradition, to make mixed religion a diriment impediment. It might, however, be treated more as a prohibitive impediment, *i.e.* to be discouraged, possibly forbidden, unless the non-Anglican party understands and accepts the Church's teaching as to the indissolubility of marriage. This may raise the question of sufficient intention, considered later. Marriage to persons who, though members of the Church, have fallen into atheism or agnosticism should also be discouraged, and the dangers pointed out. In this connexion we think it well worth quoting Canon W. L. Knox, writing in 1923:

> The only solution for the difficulty would appear to be the recognition of the right of the Church to refuse her sanction to all marriages in which the partners are not practising Christians, who recognize the right of the Church to exercise her discipline over their lives — not only in this but in other respects. In this way the Church would be able to secure the observance by her children of their obligations in respect to Christian marriage, while she would not be compelled to solemnize the external forms of matrimony between those who do not in fact accept her doctrine as to the nature of the marriage contract. It has been urged that this solution would mean the disestablishment of the Church of England; but this would be better than the profanation of the sacrament of holy matrimony.[17]

Preparation for Marriage.—The Report of the Joint Committees contains a chapter on this, which we strongly commend

[17] Canon W. L. Knox, *The Catholic Movement in the Church of England*, 1923, p. 89.

to the attention of our readers. We do not propose to write on this, as all we could wish to say is far better said in that chapter. For those who have not read the Report, we will only say that it recommends that parties be prepared by instruction (1) as to the nature and obligations of Christian marriage, in its presupposition of faith in God, and in the Divine grace which goes with it; (2) as to right conduct in married life, *i.e.* both in the sexual life and otherwise; (3) in relation to the coming of children. The importance of these matters is enormous, though unfortunately in the past proper instruction has been hindered by a reluctance to mention such matters, a reluctance now generally realized to have caused great harm and much unnecessary misery. We think that the proper authorities might consider whether it would be practicable to require, before marriage, some certificate that proper and adequate instruction had been given, similar to that required from the priest who prepares candidates for confirmation.

Consanguinity and Affinity.—We have already quoted the conclusions, on matters of principle, both of the Joint Committees and of the Palmer Commission. The latter also makes certain recommendations, one of which is the substitution of a new definition of affinity different from Archbishop Parker's. This is "that impediments of affinity should be deemed to be created either by a marriage recognized by the Church or by any civil marriage or by habitual or notorious cohabitation".[18] They also recommend that for the Church of England in England there be substituted a new Table of Prohibited Degrees to take the place of Archbishop Parker's. This new Table[19] in effect restricts the impediments arising from affinity to the first and second degrees in the direct line, and abolishes it altogether in the collateral line. This, with the suggested new definition of affinity, would, in effect, have the same result as the impediment based on public propriety established by Canon 1078 of the Roman Code (see *supra*, Chapter V, p. 61). It also adopts Sir Harry Vaisey's suggestion, on p. 81 of the Report

[18] Palmer Report, p. 83.

[19] *Ibid.* p. 90.

of the Joint Committees. We have already stated that the whole matter is now under consideration by the Joint Committees of the two Convocations, so it is reasonable to hope that the Church's law on these matters will before very long be thoroughly revised. Such a revision, carrying out the above recommendations, appears both desirable in itself and conformable to catholic tradition. As regards consanguinity, we would venture to suggest that the prohibitions should include the marriage of double first cousins, *i.e.* the children of the marriages of two brothers to two sisters, or of brother and sister to sister and brother: such cousins are descended from the same four grandparents. As the only objection to such marriages, as distinct from marriages of ordinary first cousins, is on eugenic grounds, we think that the co-operation of Parliament might be sought, in order, if possible, to get them forbidden also by the law of the land.

2. FORMALITIES.—As has already appeared, the public religious solemnization of marriage was not, for nearly the first thousand years of Christianity, regarded as essential to its validity, although the Church strictly enjoined it under pain of grave ecclesiastical penalties. It has also been seen that the motive which led the Church to alter her rule was the wish to abolish the very serious mischief of clandestine marriages. At the time that this alteration was made — in Rome at the Council of Trent, and in the Church of England in 1754 — those Churches had exclusive jurisdiction over all matrimonial matters, and in England the effects and incidents of marriage were governed by the Church's law: the idea of a divergence between Church law and secular law had not then developed. It was natural therefore that the publicity required to stop clandestinity was secured by requiring public religious solemnization in church; the only exceptions being made in the case of Jews and Quakers. When in 1836 secular solemnization was permitted, matrimonial suits were still determined by Church Courts, and the effects and incidents of marriage were still those of the Church's law; divorce had not yet been introduced. There was therefore no reason why the Church could not accept as

valid register office marriages, for even though the form of words omitted " till death us do part ", this was, in law, still the effect. The secular marriage protected from the mischief of clandestinity, and, as we have seen, the requirement of religious celebration was never, in catholic doctrine, treated as a dogmatic definition of the essentials of Christian marriage, but rather as a disciplinary or positive ecclesiastical requirement.

Now, however, the position is entirely different: the law of England admits divorce, with right of re-marriage in both parties, for a variety of grounds, and in fact there is divorce by consent. Moreover the right to divorce is an inescapable incident of every marriage where the husband's domicil is English: it cannot be excluded, by express contract or otherwise. It seems therefore that, at any rate in register office marriages, there can be no presumption that the parties intended to contract a Christian, or indissoluble, marriage: it might almost be said that in this case the presumption was the other way.

We are not alone in thinking that a large number of persons when they get married intend a marriage with all the rights which the law gives them. Lord Roche, speaking in the House of Lords during the debate on the second reading of the Matrimonial Causes Bill (now the Act), said:

> I am satisfied that there are scores and hundreds of people who marry without due circumspection, with the thought, sometimes conscious but more often subconscious, in their minds, that if they do not agree there is a speedy way out.[20]

To much the same effect were the remarks of the then Archbishop of Canterbury, on the same occasion:

> Moreover, as we all know, opinions are expressed in quarters where one might least expect to hear the expression that it is legitimate to regard marriage as an experiment which, after trial, may very fitly be brought to an end if it is not wholly successful.[21]

We do most strongly suggest, therefore, that the Church

[20] Official Report, vol. 105, col. 768.
[21] Official Report, vol. 105, col. 749.

should insist, as a condition of treating a marriage as a valid Christian marriage, that it be celebrated in church. The theoretical justification of this is, as we have tried to show, that it is not otherwise possible to know whether what has been contracted is intended to be an indissoluble Christian marriage, or one dissoluble in accordance with the law of the land. This uncertainty is just as much clandestinity, with all its mischiefs, as runaway marriages.

Whether and to what extent marriage in the churches of other Christian denominations should be included as church marriages for the purpose of this rule is a difficult question. It might depend on the teaching and practice of the particular denomination; also that teaching and practice would have a bearing on the presumption of sufficient intention. Obviously where both parties were members of another denomination, the question could only arise if and when one or both joined the Church of England, or where, after a divorce, marriage to an Anglican were contemplated.

3. NULLITY.—In the Report of the Joint Committees, printed as Appendix V, is an able and interesting Memorandum on Nullity of Marriage by Sir Harry Vaisey (then Chancellor H. B. Vaisey, K.C.), to which we referred shortly on p. 135. Of the grounds which Sir Harry Vaisey recommends might properly be recognized as grounds for nullity — a recommendation endorsed by the Joint Committees — most are now contained in the Matrimonial Causes Act, 1937. As we have seen, the new statutory grounds are: (1) wilful refusal to consummate the marriage, (2) one party being of unsound mind or mentally defective or subject to recurring fits of epilepsy, (3) one party suffering from venereal disease in a communicable form, and (4) pregnancy of the wife by another man. In the case of the last three grounds the party seeking a decree must have been ignorant of the facts, and intercourse must not have taken place after that party discovered the facts. These additional grounds the Church is, we believe, willing to accept as proper, and in our opinion rightly so. It is interesting, however, to examine them in the light of catholic teaching, which we tried, in Chapter VI,

briefly to explain. The theological principle on which the last three seem to rest is, we think, error as to condition (see *supra*, Chapter VI, p. 71). As we there saw, this error, to invalidate a marriage, must be such as in truth to amount to an error as to the person. Sir Harry Vaisey suggests that there is not, in these cases, any true consent, since it was given " upon an imperfect appreciation of relevant and indeed essential facts " ; he further suggests that the contract of marriage should be ranked as a contract *uberrimae fidei*.[22] These grounds definitely involve a very great extension of previous catholic teaching and practice, even though they be, as we think they are, thoroughly sound in principle. The first ground, wilful refusal to consummate, is one which heretofore has been rejected by the catholic church, though admitted in the East. In our opinion its inclusion can be justified on traditional principles on either of two grounds. Firstly, the ordinary normal married man or woman cannot really imagine refusal by a person pronounced by doctors to be neither physically nor psychologically impotent unless that person be mad, if not in the medico-legal, at least in the common-sense acceptation of that word. It is therefore highly arguable that refusal is conclusive evidence of such an abnormal state of mind as renders its victim incapable of contracting marriage, and should rank, therefore, as a case of mental incapacity. Secondly, it is extremely probable that, at the time of the marriage, the party in question never intended to give to the other those conjugal rights which are essential to marriage, *i.e.* that he never really intended to contract marriage, his subsequent conduct being conclusive evidence of this.[23] The acceptance by the Church

[22] Report of Joint Committees, p. 81. A contract *uberrimae fidei* is one in the negotiating and making of which each party is by law bound to make to the other a frank and full disclosure of all relevant facts. Failure by either party to do this entitles the other party to set aside the contract.

[23] The following figures are of interest. For the years 1939 to 1943, both inclusive, but for 1943 only for the first ten months, 413 decrees were made for wilful refusal, of which 287 were on husbands' petitions and 126 on wives' petitions. In the same period 412 decrees were made for impotence or incapacity, 152 on husbands' petitions, 260 on wives' petitions. These figures were very kindly supplied to the author by the Divorce Registry.

of these grounds is a considerable extension of her law; an extension much to be welcomed.

There is, however, another aspect of consent which no recommendation in the Report touches, although Sir Harry Vaisey mentions it, but without making any definite recommendation. We refer to the intention to contract marriage as understood by the Church. In para. II of his Memorandum, p. 71, the requisites of a genuine marriage are stated; these include

(*d*) That the parties understanding the nature of the contract should freely consent to marry one another. . . . (*f*) That the union into which the parties enter should be a union for life as husband and wife to the exclusion of all other persons. And [adds Sir Harry Vaisey] only such unions as satisfy all these requisites are marriages in the sense in which that word is used and understood in England.

With all respect to Sir Harry Vaisey, we cannot accept the above as an accurate statement either of law or of fact. As we have tried to show, the right to divorce and re-marriage is given by the law, and cannot be excluded by contract or otherwise. Into every marriage the law imports a proviso of defeasibility. Also in fact divorce is consensual; a fact known to all and approved by a large number. It is undoubtedly true that a large number of persons contract marriage intending, should it prove unsuccessful, to dissolve it, and probably try again. Sir Harry Vaisey of course realizes that consent directed to something other than marriage does not create marriage, and instances a definite agreement for a union for a definite limited time, *e.g.* seven years, and an agreement allowing the husband to continue to cohabit with a mistress. According to the Church's teaching this would unquestionably invalidate the marriage, but we think that there is equally no question but that the Divorce Court would not grant a decree of nullity on proof of such facts. That Court would, we feel sure, hold that such agreements, being unlawful, must be treated as never having been made, and uphold the marriage.

If the suggestions we have ventured to put forward under

heads 1 and 2 were adopted, two results would, we think, follow: first, that a far larger proportion of those marriages then recognized by the Church would *in fact* have been contracted with the intention of contracting an indissoluble Christian marriage; second, that the presumption that this was so would become justifiable as more nearly corresponding with fact. There would inevitably be some cases where this would not be so, and where, difficult though the proof must necessarily be, it could be established as a fact that, at the time of the marriage, it had been agreed between the parties that, if it proved unsuccessful, it should be dissolved. Such cases do occur, probably more frequently than is realized; nor in countries, such as Scotland, where divorce is granted for desertion, is the sinfulness of such an arrangement as striking to the uninstructed or the very young as where, as in England before 1937, it necessitated adultery or the appearance thereof. We suggest, therefore, that the Church establish machinery, in the form of some kind of tribunal, to which such cases could be referred, and which, on satisfactory proof that the parties had in fact intended a union dissoluble in certain contingencies, could give effect thereto and declare that their marriage was not, and never had been, a valid Christian marriage.

As stated above, the case of marriages of Christians belonging to other denominations is a difficult one. It is not, we think, insoluble; the teaching and practice of the particular denomination would be relevant in determining such questions as the strength of the presumption in favour of validity, and the onus of proof. We are sure that it is not beyond the skill of those versed in catholic tradition and law to frame such rules in this matter as would, without departing from sound catholic principles, enable justice to be done as far as is humanly possible. Whether such a declaration should be made while the marriage was still subsisting as a valid legal marriage, or only after it had been dissolved by the secular authority, is again a question which would have to be carefully considered.

The above are, in broad outline, the lines on which we

think that there is urgent need of reform in the law and practice of the Church. There are many connected matters on which we have not touched, and which we do not intend to develop; *e.g.* whether compulsory civil marriage should be established instead of the present system; what alterations of the canons or what Parliamentary legislation (if any) would be necessary or desirable. These are questions which will have to be considered and dealt with by those, in Church and State, qualified in that respect, which we are not. What we do urge, and urge strongly, as a most pressing need, is that the Church cease to behave like an ostrich, and realize that in this year of grace, 1944, marriage does not mean, either in English law or in the minds of the majority of the people, what it meant in, say, 1754 or 1836. The Church is often accused of being behind the times, and we agree, though not in the sense usually intended. God forbid that we should wish the Church to sacrifice either Christian truth or catholic tradition to the demands of, so-called, public opinion. As already appears, our accusation of being behind the times is that the Church, while rightly affirming principles of catholic tradition, imports into the words in which those principles are expressed meanings which they no longer bear. Thus the Church of England has, quite unconsciously, come in practice to treat as indissoluble unions which, according to centuries-old traditions of the universal Church, are not marriages at all. It is in vain that, in a particular case, X alleges that his marriage was never intended, was indeed by express agreement between the parties agreed not to be, an indissoluble union; that the State, as well as that branch of the Church to which he then belonged, allows divorce and re-marriage. The Church of England neither does, nor possesses machinery to, enquire into the truth of such allegations. However conclusive the evidence may be, X is told that merely because he cannot, in such circumstances, obtain a decree of nullity from the secular Court, his marriage, already probably dissolved by that Court, is by the Church of England irrebuttably presumed to be a valid Christian marriage, although on principles established by age-long

catholic tradition and teaching — principles to which the Church of England pays lip service — it is demonstrably not so. Our proposals would, we submit, have three good results. First, they would serve to remind Churchpeople, and others, of the essentials of Christian marriage by the care shown by the Church in ensuring, as far as possible, that the marriages she allows to her children and which she blesses, are really in intention Christian marriages, in which the help of Divine grace may confidently be expected. Secondly, they would provide a means by which, in individual cases, marriages which had quite come to grief could be examined to see whether, on catholic principles, they ever were in fact indissoluble Christian marriages; and where they were found not to have been, they could be so declared.[24] And thirdly, and finally, they would put the Church in a much stronger position to enforce strictly her discipline on any of her children who, having contracted a real valid Christian marriage, re-married after a divorce.

[24] For a very similar argument see Sir Harry Vaisey's Memorandum, Report of Joint Committees, p. 82.

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